Supreme Court, U.S.
FILED
MAY 15 2000
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No.

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
pro se, on behalf of themselves and class of similarly situated persons,

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

Preface

An employer implemented a voluntary early retirement incentive plan (hereafter "VEREP"). Before the eligibility periods expired the positions of some of the individuals eligible for VEREP were eliminated. Petitioners and prospective class members compose that class of individuals. This class was given no option to remain employed. All remaining individuals had the option of remaining in their positions or retiring under that plan. The employer also eliminated the positions of others, not eligible for VEREP, these individuals qualified for severance benefits. Petitioners and prospective class members who qualified for VEREP also qualified for these same severance benefits. Petitioners and the prospective class were denied or required to chose between VEREP and their severance benefits. All petitioners and prospective class members are in the age-protected class; all have pension eligibility status.

This petition presents five questions to the Supreme Court, which collectively, constitutes an issue of first impression.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq.* If so, what is the remedy?

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, prohibit the reduction or denial of severance to

those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) or (ii) or §623 (*l*)(2)(A)? If so, were the conditions set forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq*., by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

LIST OF PARTIES

Petitioners before this Court and appellants in the proceedings below are:

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM and CAROLYN HOLDER,
pro se on behalf of themselves and class of similarly situated persons.

v.

Respondents before this Court and appellees in the proceedings below are:

JOHNSON & JOHNSON, a New Jersey Corporation.

THE SEVERANCE PLAN OF JOHNSON & JOHNSON AND AFFILLIATED COMPANIES,

its Plan Administrator,

THE JOHNSON & JOHNSON PENSION COMMITTEE.

MCNEIL-PPC, INC., also known as the Personal Products Company ("PPC"), a New Jersey Corporation.

JOHNSON & JOHNSON WORLDWIDE ABSORBENT PRODUCTS MATERIALS & RESEARCH, an unincorporated division of Johnson & Johnson.

as class action defendants, those identified above AND the affiliates of the Johnson & Johnson & Affiliated Companies identified below:

"A" COMPANY, a Delaware Corporation, a domestic subsidiary doing business in California.

ABSORBENT PRODUCTS & MATERIALS RESEARCH, a New Jersey Corporation.

ADVANCE CARE PRODUCTS, INC., a New Jersey Corporation.

CELLULOSE PRODUCTS CORP., a New Jersey Corporation.

CODMAN & SHURTLEFF, INC., a domestic subsidiary doing business in various locations including Massachusetts and Kentucky.

CRITIKON, INC., a Florida Corporation.

ETHICON ENDO-SURGERY, an unincorporated entity doing business in Ohio.

ETHICON, INC., an Ohio Corporation.

IMMUNOBIOLOGY RESEARCH INSTITUTE, INC., a New Jersey Corporation.

IOLAB CORPORATION, a California Corporation.

JASSEN PHARMACEUTICA INC., a New Jersey Corporation.

JASSEN RESEARCH FOUNDATION, an unincorporated entity doing business in Michigan and Pennsylvania.

JOHNSON & JOHNSON ADVANCED MATERIALS COMPANY, a New Jersey Corporation.

JOHNSON AND JOHNSON CONSUMER PRODUCTS, INC., a New Jersey Corporation.

JOHNSON & JOHNSON DEVELOPMENT CORPORATION, a New Jersey Corporation.

JOHNSON & JOHNSON FINANCE CORPORATION, a New Jersey Corporation.

JOHNSON & JOHNSON HEATH CARE MANAGEMENT, INC., a New Jersey Corporation.

JOHNSON & JOHNSON HOSPITAL SERVICES, INC. a New Jersey Corporation.

JOHNSON & JOHNSON INTERNATIONAL, a New Jersey Corporation. (emphasis added)

JOHNSON & JOHNSON INTERVENTIONAL SYSTEMS COMPANY, a New Jersey Corporation. (emphasis added)

JOHNSON & JOHNSON MEDICAL, INC., a New Jersey Corporation.

JOHNSON & JOHNSON MERCK CONSUMER PHARMACEUTICALS CO., a New Jersey Corporation.

JOHNSON & JOHNSON ORTHOPEDICS, INC., a New Jersey Corporation.

JOHNSON & JOHNSON SERVICES INC., a New Jersey Corporation.

JOHNSON & JOHNSON VISION PRODUCTS, INC., also known as VISTAKON, a Florida Corporation.

LIFESCAN, INC., a California Corporation.

MCNEIL COMSUMER PRODUCTS, a New Jersey Corporation.

MCNEIL SPECIALTY PRODUCTS COMPANY, a New Jersey Corporation.

NORAMCO, INC., a Georgia Corporation.

ORTHO BIOTECH, INC., a New Jersey Corporation.

ORTHO DIAGNOSTIC SYSTEMS INC., a New Jersey Corporation.

ORTHO PHARMACEUTICAL CORP., a Delaware Corporation.

R.W. JOHNSON PHARMACEUTIAL RESEARCH INSTITUTE, an unincorporated entity doing business in New Jersey.

SITE MICROSURGIAL SYSTEMS, INC. a Pennsylvania Corporation.

THERAKOS, INC., a Florida Corporation.

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PETITION FOR WRIT OF CERTIORARI

Hawes *et al.* v. Johnson & Johnson *et al.*,
No 98-6408, (3rd Cir. Oct.20, 1999)

Petitioners respectfully pray that a writ of *certiorari* issue to review all the judgements of the United States Court of Appeals for the Third Circuit entered on October 20, 1999 and the denial of petitions for rehearing *en banc* on December 30, 1999.

OPINIONS AND JUDGEMENTS BELOW

The opinion and orders of the United States Court of Appeals for the Third Circuit filed on October 20, 1999, and petitions for rehearing and rehearing *en banc* denied on December 30, 1999 are unreported and reprinted herein at App.1-20.The opinions and orders of the District Court of New Jersey are unreported and are reprinted herein at App.24-43. (Hawes, *et al*, 24-31), (Class Certification, App.32-38), (Holder, App. 39-43).

STATEMENT OF JURISDICTION

Based upon their allegations regarding severance benefits, petitioners asserted original federal jurisdiction pursuant to 28 U.S.C. §1331(a) (federal question), 28 U.S.C. §§2201 and 2202 (declaratory relief), 29 U.S.C. §626(c) (ADEA violations) and 29 U.S.C. §1132(e) (ERISA plan benefits), and pendant jurisdiction as to their state law claims. (JA53-54 1-2, JA116 1-2, Joint Appendix on appeal hereafter ("JA")). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). App.130.

THE COURT'S ORDERS PERTAINING TO PETITION FOR WRIT OF CERTIORARI

On March 1, 2000, the Court granted petitioners' Application for an extension of time to May 1, 2000 to file petition for a writ of *certiorari*. On April 12, 2000, the Court granted petitioners' Second Application for an extension of time to May 16, 2000 to file petition for a writ of *certiorari*. On April 12, 2000, Associate Justice, the Honorable David Hackett Souter granted petitioners' Application to

file petition for a writ of *certiorari* in excess of the page limitations provided that the petition does not exceed 36 pages.

STATUTES INVOLVED

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RATIONALE FOR THE QUESTIONS PRESENTED

Petitioners submit to this Court that it is the ADEA, as amended by OWBPA, which provides the controlling statutes for ERISA and all other employee benefit plans where the benefits are applicable to an age-protected individual. Neither an employer, nor an ERISA plan administrator, nor even a Court of Law may act in a manner contrary to the mandates of these controlling statutes.

Section 4(a) of the Age Discrimination in Employment Act (ADEA) codified at 29 U.S.C. §623(a)(1) makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." App.131. See also N.J.S.A. §10:5-12(a).

When Congress enacted Title I of the Older Workers Benefit Protection Act ("OWBPA"), in October 1990 it specifically repudiated this Court's decision in Ohio Public Employees Retirement System v. Betts ("Betts"), 492 U.S. 158 (1989). See S. Rep. No. 263, 101st Cong. 2d Sess., reprinted in 1990 U.S. Code Cong. & Admin News at 1517.

Notwithstanding this Court's interpretation of ADEA in Betts, Congress explained that the Older Worker's Benefit Protection Act was intended:

> to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations. (emphasis supplied)

Pub.L. No. 101-433 at §101, 104 Stat. at 978. See App.131

Congress therefore added a provision to ADEA now codified at **29 U.S.C. §630(*l*)** making it clear that "all employee benefits provided pursuant to a bona fide employee benefit plan" were encompassed within the term "compensation, terms, conditions, or privileges of employment" and therefore subject to ADEA's prohibitions upon age discrimination. Congress also removed from **29 U.S.C. §623(f)(2)** the "subterfuge" language relied upon by this Court in Betts to require subjective proof of discriminatory motive with regard to differences in benefits provided to older and younger workers [1], and replaced it with an objective test, only permitting a

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[1] In Betts, this Court relied upon the subterfuge language then codified at 29 U.S.C. §623(f)(2), to hold that all bona fide benefit plans that are not "a method of discriminating in other nonfringe-benefit aspects of the employment relationship" were exempt from ADEA, and that an employee challenging a benefit plan under ADEA "bears the burden of proving that the-discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship". 492 U.S. at 181.

plan administrator to implement an offset between severance and pension benefits under the specific circumstances set forth in 29 U.S.C. §623(*l*)(2)(A), or 29 U.S.C. §623(f)(2)(B)(i)

> where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

See 29 U.S.C. §623(f)(2)(B)(i) at App.132. See CFR 1625.10 at App.138-142.

The federal regulations thus incorporated into ADEA at 29 U.S.C. §623(f)(2)(B)(i) specify that where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of Section 4(a), see 29 C.F.R. §1625.10(a)(2) at App.139. It is, however, an act of age discrimination, regardless of prohibited motive, to interpret and/or apply any benefit plan provision to provide older workers lower benefits than younger workers unless the reduction can be justified by a higher cost incurred to provide that particular benefit to older workers. See 29 C.F.R. §1625.10(a)(1), (a)(2), (b), (c), (d) and (f) at App.138-142.

A grant of *certiorari* in this case will afford the Supreme Court of the United States an important opportunity to examine an issue of first impression in interpreting the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*, as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No.101-433, 101st Cong., 104 Stat. 978 and its intertwining effects on all employee benefit plans including those qualified under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1001 *et seq*. At issue are the statutory provisions of OWBPA that prohibit an employer from requiring or permitting the involuntary retirement of an individual because of age and the provisions that permit an employer to deny or to offset severance

benefits with pension benefits for which an age-protected employee is independently qualified.

STATEMENT OF THE CASE: -PART I- FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

Petitioners and prospective class members are former employees of Johnson & Johnson or its Affiliated or Subsidiary Companies (hereafter "J&J Companies") who were qualified for severance benefits pursuant to the terms of a severance plan sponsored by Johnson & Johnson and qualified under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, (hereafter "ERISA"). See the Severance Plan of Johnson and Johnson and Affiliated Companies at App.44-58, (hereafter J&J severance plan). See Article 8.2, Controlling Law at App.57. The J&J severance plan was executed by the Pension Committee of Johnson & Johnson, the plan administrator, on September 8, 1992, see App.58. Petitioners and prospective class members were also qualified for the Johnson & Johnson Voluntary Early Retirement Enhancement Program, (hereafter "VEREP"), a qualified voluntary early retirement incentive plan under ERISA, 29 U.S.C. §1002 *et seq*. See (JA479).

VEREP was amended into the Retirement Plan of Johnson & Johnson and Affiliated Companies on December 15, 1994 and made retroactive to January 1, 1989. See CERTIFICATION OF PENSION PLAN AMENDMENT AND RESTATEMENT at App.95, (JA409). See ARTICLE 12, EARLY RETIREMENT INCENTIVES at App.63-65. See EXHIBIT E, EARLY RETIREMENT INCENTIVE PROGRAMS at App.66-73. See TABLE OF CONTENTS of the Retirement Plan of Johnson & Johnson and Affiliated Companies at App.59-62. See entire plan at (JA409-509).

VEREP requires the attainment of the minimum age of 50 as a condition of eligibility. Therefore by necessity all employees who qualified for VEREP are age-protected individuals, See 29 U.S.C. §631 (a) where; *"The prohibitions in this chapter shall be limited to*

individuals who are at least 40 years of age." App.136. See Key to Eligibility Requirements, App.72 at (a).

The purpose of VEREP was to encourage Johnson & Johnson's workers who qualified to retire voluntarily. VEREP included the following three retirement incentives:

1) Increasing an individual employee's pension benefit by the addition of (5) years to an individual's age and the addition of (3) years to an individual's credited service. See VEREP plan at App.66-67, see Second Affidavit of Robert Muscarella at App.88 at ¶ 3, see exhibits attached thereto at App.92-93, 94.

2) A "Service Benefit" paid from the pension plan and equal to two weeks of regular base pay multiplied by the total number of actual years of service up to a maximum of 52 weeks. The "Service Benefit" was paid from J&J's qualified pension plan, subject to spousal consent, subject to an additional early distribution tax of 10%, not taxed for social security and qualified for a "roll over" into an Individual Retirement Account (IRA). The VEREP provided an option in that the "Service Benefit" could be elected as a lifetime annuity. If this option is elected the "Service Benefit" is added to and paid out in the individual's regular monthly pension benefit. See VEREP subsection (b), App.67-68, (JA503b-504b), Affidavit at App.88 ¶¶ 4-6 (JA382-383), App.92 (JA387-388), App.94 (JA408). See also (JA403-404) at Q&A 48, (JA397-398) at Q&A 24 & 26. The Court may note the characteristics of the "Service Benefit" are that of a pension benefit. This fact is critical to a meaningful analysis of this case.

3) The right to elect retiree medical benefits and receive retiree life insurance, if an individual had not already acquired that right. An individual age 55 or older had previously qualified for this right, See App.92, (JA387).

VEREP, which must be and is written to comply with ADEA, see 29 U.S.C. 623(f)(2)(B)(ii) at App.132, was offered extensively

throughout no less than **30** J&J Companies. These same J&J Companies also participated in J&J's Severance Plan, see and compare App.70-71 (JA507), with App.79-80 (JA205-206), see also EXHIBIT A at App.64-65 (JA488-489). See transcript of 3rd Cir. oral argument hereafter "TS" at 123-124 ln.32-4.

Employees of J&J Companies were qualified for VEREP if they had obtained the minimum age of 50, had a minimum of (7) years of service, App.72 (a) (JA508), and met certain other qualifications as defined in the plan, (hereafter "VEREP individual(s)". See "Key to Eligibility Requirements" at App.72-73 (a)-(s) (JA508-509).

VEREP individuals were provided 45-day eligibility-election periods. These periods varied among the J&J Companies, however each age-protected individual had his or her own 45-day period. See App.70-71 (JA507).

In no way were the qualifications or eligibility requirements for VEREP conditioned upon position elimination or termination of employment. See "Key to Eligibility Requirements" at App.72-73 (a)-(s) (JA508-509). The Court may note, this fact is critical to a meaningful analysis of this case.

The general population of J&J employees who qualified as VEREP individuals had the option of electing the plan, receiving the package of enhanced benefits it provided by retiring or to remain employed. The Court may note, this fact is critical to a meaningful analysis of this case.

The positions of petitioners and prospective ERISA class members were eliminated before their 45-day eligibility period expired. Petitioners and prospective ERISA class members did not have the same options as other VEREP individuals because none had the option of remaining employed, (hereafter "VEREP *eliminated* individuals"). As discussed *infra* at pg.8. The Court may note, this fact is critical to a meaningful analysis of this case.

During the VEREP eligibility periods the same J&J Companies eliminated the positions of others, not qualified for the VEREP, in both the age-protected and non-age-protected classes. These other

employees were eligible and qualified for severance benefits equal to or greater than the minimums provided by J&J Severance Plan (hereafter "*others*"), all petitioners qualified for greater severance benefits. COMPARE: the number of weeks provided by: Milltown Plant Closure at App.85 (JA171) with J&J Severance Plan at App.50-51 subsections (a), (b) Minimum Benefit i-iii, and (c) Maximum Benefit. See defendants' reply brief on appeal at pg.14 reprinted at App.143, hereafter "DB".

In response to Magistrate Judge Ronald Hedges' order in this case on March 20, 1995, defendants identified no less than **30** J&J Companies that participated in the Severance Plan and VEREP, see *supra* at pg.7, See Magistrate Judge Ronald Hedges' order at App.77, ¶20. See defendants' response at App.78-80. Defendants also identified not less than **42** VEREP *eliminated* individuals, excluding petitioners who had qualified for severance and VEREP. See App.80-82 (JA207-208), 82-84 (JA209-210). COMPARE: the individuals listed and respective companies at App.78-84 with participating VEREP Companies listed at App.70-71.

It is undisputed that all four petitioners were informed that their terminations would take effect on October 29, 1993, DB at pg.7, The Personal Products Company (hereafter, "PPC"), a J&J subsidiary company, closed the engineering department where they were employed. PPC announced J&J's VEREP was available to its employees who met the eligibility requirements on September 1, 1993. The VEREP expiration date for all PPC's eligible employees was October 30, 1993, in all practical terms the same effective date as petitioners' scheduled terminations. Find Personal Products Company listed on App.70, COMPARE with App.85. (JA507 with JA171).

It is undisputed that as a result of their position eliminations, petitioners were qualified for a severance package on the same terms and conditions given to *others* who were affected by the PPC plant closure, see App.85 (JA171). See DB pg.14 at App.143. It can not be disputed that petitioners were required to choose between that severance package and the VEREP and that no other choice was provided to petitioners. See and COMPARE: SEVERANCE GUIDELINES PPC ENGINEERING (MILLTOWN PLANT

CLOSURE) at App.85 (JA171) with Memo to Robert Muscarella from R. J. Rapiejko, indicating choice between separation package and VEREP at App.86 (JA189). See Affidavit of Robert Muscarella at App.110 ¶¶ 6-9, ¶¶13-15. See DB pg.14 at App.143.

Petitioners had a Hobson's choice. No matter what choice they made they could not have saved their jobs and remained employed.

If they chose severance, they would give up their individual right to a one-time opportunity to receive substantial retirement benefits, the right to become eligible for retiree medical and retiree life insurance. If they chose VEREP they would give up their individual right to the severance package provided to *others*. Petitioners were compelled to choose VEREP. See JA189 reformatted at App.86

Petitioners were required to give up their right to their severance package because they qualified for and received VEREP.

Prospective ERISA class members, as well petitioners, also qualified for severance under J&J's severance plan. They were not informed of their severance, were required to choose VEREP or severance, or were denied this severance because they qualified for and received VEREP. See **42** VEREP *eliminated* individuals identified by defendants at App.80-82 (JA207-208), 82-84 (JA209-210), see also App.86 (JA189). See also affidavit of Carol Sapakie (JA198-200 ¶¶ 6-7, and EXHIBIT F attached thereto at JA213-216, listing **(60)** additional prospective class members.)

Petitioners filed three separate lawsuits between November 2, 1994 and August 16, 1995. The lawsuits were consolidated for all purposes by two separate orders, on March 20, 1995 and on January 31, 1996. (JA1-3) and (JA286-287).

In Count One of their complaint, petitioners asserted a claim for severance benefits under a qualified ERISA plan, 29 U.S.C. 1001 *et seq*. This claim is before this Court. (JA72-79, Hawes, *et al*.) (JA133-137, Holder). See also J&J severance plan, Article 8.2, Controlling-Law at App.57.

In Count Two of their complaint, only the ERISA Class claims for severance under a qualified plan remain before this Court. (JA79-82, Hawes, *et al.*) (JA138-140, Holder).

In Count Three of their complaint, petitioners raised their individual claims of age discrimination in denying their severance package, all in violation of prohibitions on age discrimination set forth in the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq*. and the New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq*. See Milltown Plant Closure Severance pay at App.85 (JA171) and App.86 (JA189). See DB pg.14 App.143. These claims are before this Court. (JA83-85, Hawes, *et al*), (JA141-143, Holder)

On Order and Opinion filed on December 22,1995, the District Court granted the defendants partial summary judgement on those counts dealing with severance and denied petitioners Muscarella/Kadam/Hawes' cross motion for partial summary judgement on the same claims. See App.24-31, (PB1-1 to PB1-9, Plaintiffs' Brief on appeal, hereafter "PB").

On Order and Opinion filed on February 28, 1996, the District Court denied petitioners' certifications of ADEA and ERISA Classes, count three. See App.32-38, (PB2-1 to PB2-8).

On Order and Opinion filed on May 9, 1996, the District Court granted the defendants partial summary judgement on the same counts dealing with severance and denied petitioner Holders' cross motion for partial summary judgement on the same counts. See App.39-43, (PB3-1 to PB3-5).

Muscarella and Kadam proceeded to trial on their remaining termination claims. On September 23, 1998 a jury returned a verdict for defendants. Two days later a judgement of no cause was entered on Muscarella's and Kadam's remaining claims. See (JA642-643) (JA644).

At that point the litigation was completed as to all petitioners in the consolidated action, and final judgements had disposed of all claims with respect to all parties.

All four petitioners filed their notice of consolidated appeal on October 21, 1998, pursuant to 28 U.S.C. 1291. That appeal was limited to the orders dismissing their ERISA and ADEA severance claims and the denial of the motion to certify an ERISA class, Counts One, Two and Three. See (JA645-647)

On Judgement and Opinion filed on October 20, 1999, the Third Circuit Court of Appeals affirmed the judgements entered by the District Court and on December 30, 1999 denied petitions for rehearing and rehearing *en banc*. See App.1-20.

The instant case follows.

STATEMENT OF THE CASE: -PART II- ARGUMENTS FOR QUESTION PRESENTED

Petitioners address their arguments for each Question serially.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

The "precise and detailed statutory strictures" [2] of OWBPA make clear that the act encompasses all employee benefits, including benefits provided pursuant to a bona fide employee benefit plan, see **29 U.S.C. §630(*l*).** All procedures governing employee benefits and benefit plans, ERISA or otherwise, are to comply with the Act, (OWBPA) regardless of the date of adoption, see **29 U.S.C. §623(k).** See also: **29 U.S.C. §623(f)(2)(B), 29 U.S.C. §623(f)(2)(B)(ii), and U.S.C. §623(*l*)(2)(A),** App. at 131-134. See pg. 2-4, *supra*.

The lower Courts in this case did not examine and completely ignored these statutory mandates.

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[2] Cf. Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 841 (1998) ("the Court is required to take Congress at its word with regard to the precise and detailed statutory strictures on a waiver of ADEA claims established by Title 2 of the ("OWBPA");

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq*. If so, what is the remedy?

Petitioners submit by eliminating the positions of some VEREP individuals, defendants left VEREP *eliminated* individuals with no choice but to retire, see *supra* at pg.7-8. This action in and by itself, is age-adverse for two reasons.

First, the VEREP *eliminated* individuals did not have the option of remaining employed, as did the other VEREP individuals, in violation of U.S.C. 623 (a)(1), (2). This is *prima facie* proof of disparate treatment.

Second, it is a clear and undeniable statutory violation of 29 U.S.C. 623(f)(2)(B)(i), (ii), which states: *"...and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual"* (emphasis added). Defendants' violation of this express statute is proof of illegal adverse treatment.

COMPARE: the statutory language of 29 U.S.C. 623 (f)(2)(B) (ii), *supra,* with Sen. Comm. on Labor and Human Resources, 102d Cong., *Legislative History of the Older worker Benefit Protection Act* (Leg. Hist.), see Early retirement incentive plans at pg.27-28, which states:

> Since the 1978 amendments to the ADEA, there has been a dramatic rise in the number of early retirement incentive programs used by employers. These programs are designed to encourage individuals voluntarily to depart employment through the provision of additional financial incentives. .....EEOC testified that these two criteria should be included in the legislation. .....(1989).

> First, the amendments prohibit an early retirement incentive plan from requiring or permitting the involuntary retirement of any individual protected by the ADEA. Because early retirement incentive plans, by definition, target older workers, the circumstances surrounding their implementation must be carefully analyzed to ensure that they provide older workers with an uncoerced and free choice. .....The critical question involving allegations of involuntary retirement is whether, under the circumstances, a reasonable person would have concluded that there was but no choice but to accept the offer. *See Paolillo v. Dresser Industries*, Inc. 821 F./ 2d 81, 84 (2d Cir. 1987). ..... with the burden of proof under section 4(f)(2)(B), the employer bears the burden to demonstrate that the employee's participation in the plan is voluntary. (emphasis added).

See Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121 (6th Cir.1998) (early retirement upon elimination of position is constructive termination).

The 9th Circuit Court of Appeals recently found that an individual was required to retire within the meaning of 29 U.S.C. 623(f)(2) when his long-term disability was offset by pension benefits he could receive only by retiring. See Kalvinskas v. California Institute of Tech., 96 F.3d 1305 (9th Cir. 1996). The Court:

> ..... Caltech violated S 4(f)(2) of the ADEA, 29 U.S.C. S 623(f)(2), by offsetting Kalvinskas' disability benefits with pension benefits that he could receive only by retiring. Id. at 1307.
>
> ...we hold that a reasonable person in Kalvinskas' position would feel he had no choice but to retire." [5]
> Thus, Caltech's LTD plan, as applied to Kalvinskas, ' require[d]' his involuntary retirement within the meaning of S 4(f)(2).(emphasis added) Ibid.

The Kalvinskas Court at fn.5 further stated:

"The test for determining whether an employee benefit plan "require[s] or permit[s] the involuntary retirement of an individual," in violation of S 4(f)(2) is whether a reasonable person in the employee's position would feel compelled to resign under the circumstances. See Bodnar v. Synpol, Inc., 843 F.2d 190, 192-93 (5th Cir.) (test for constructive discharge under ADEA is "whether a reasonable person in the employee's position would have felt compelled to resign under the circumstances"; a ***prima facie*** case of age discrimination is established when "[a]n employer's 'offer' of early retirement ... sufficiently alters the status quo"), cert. denied, 488 U.S. 908 (1988); Henn v. National Geographic Soc'y, 819 F.2d 824, 829 (7th Cir.) (involuntary retirement under ADEA S 4(f) (2) may be shown if employer "manipulated the options so that [the employees] were driven to early retirement not by its attractions but by the terror of the alternatives"), cert. denied, 484 U.S. 964 (1987); S. Rep. No. 263, 101st Cong., 2d Sess. 5 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1532 ("The critical question involving allegations of involuntary retirement is whether, under the circumstances, a reasonable person would have concluded that there was no choice but to accept the offer [to retire].") (emphasis added). Id. at 1308, fn.5.

In the examination of the instant case, the District Court found that petitioners were told they were eligible for severance but found it unnecessary to determine whether petitioners were terminated (or retired) voluntarily or involuntarily. Hawes et al. v. Johnson & Johnson et al., No 94-5332, slip op. (DNJ Dec. 18,1995) App.24-31, (PB 1-9) the Court: "Defendants assert that plaintiffs were not terminated, but were given the option to retire by taking VEREP; therefore §4.1(b)(ii) is not applicable to plaintiffs". Slip op. at 2 App.26, op. at 4 App.28.

The court summarily stated: "Assuming arguendo that plaintiffs were involuntarily terminated," slip op. at 4, App.28.(PB1-5) and concluded; "...plaintiffs were treated better than younger employees because VEREP entitled them to immediate receipt of their pension benefits and additional medical benefits." (emphasis added). Slip op, at 9, App.30.

The Court examined the J&J severance plan, but did not examine the terms and qualifications of the VEREP and did not consider OWBPA provisions anywhere in its opinion. Both parties had discussed these statues extensively in their summary judgement pleadings; and the record before the Court included both plan documents in their entirety (JA409-509, J&J retirement plan) (JA109-113k, J&J severance plan). See cross motions for partial summary judgement, plaintiffs' initial brief at pg.26-31, defendants' initial brief at 19-20, transcript of oral argument for PSJ at 15 (JA526 ln.10-11). Nonetheless the Court ignored these record references and statutory citations.

The same Court in the companion case of Holder v. Johnson & Johnson, No. 95-4351 (D.N.J. May 9, 1996) stated:

> The Court's previous decision to grant summary judgement was based on the fact that the persons who choose VEREP rather than severance were economically advantaged. Furthermore, the court held that there was no evidence of age discrimination because the older employees, plaintiffs, were treated better than the younger employees, i.e. received more money. (emphasis added), slip op. at 4, App.43, (PB3-5)

The consolidated cases went before the 3rd Circuit Court of Appeals, Hawes et al. v. Johnson & Johnson et al., No 98-6408, (3rd Cir. Oct.20,1999), App.1-20.

At oral argument defendants' counsel, cited provisions in the J&J severance plan and asserted that the two triggering events: 1) involuntary termination, qualifying for severance, and 2) voluntary termination, qualifying for VEREP, were mutually exclusive and therefore petitioners terminations was voluntary because they choose VEREP. See transcript of oral argument, hereafter "TS" at App.126 line 6-18. See DB at pg.18, pg.39-40 reprinted at App.143-144. See also DB at pg.12-14, pg.21-23. Counsel asserted petitioners voluntarily retired notwithstanding the absence of any option to remain employed. Defendants cited no statute but relied on the "sole

discretion" of the Pension Committee to make these determinations. See 3rd. op. at pg.11, App.10-11.

At oral argument defendants' counsel also asserted that all VEREP eligible employees were informed that they could not participate in VEREP and at the same time receive severance, citing JA189. 3rd Cir. Op. at 8-9 & Footnote [4] at App.9. See (JA189) at App.86. See TS at App.124-125, line 31 to 23, TS at App.126, line 15-22.

The choice stated in (JA189) is explicitly defined in that document where JA189 speaks, *"If you take VEREP you are not eligible for the separation package as outlined at the meeting of August 20, 1993."* (emphasis added). The separation package (JA171) is one in the same as the release of all claims. See DB at pg.14 reprinted at App.143. See App.86 (JA189) COMPARE with App.85 (JA171). See Affidavit of Robert Muscarella, App.110 par.6-9, and at App.111, par.15. See release of all claims dated September 1, 1993 at (JA173-174).

JA189, does not support counsel's assertions. Counsel did not cite and could not cite from: the plan documents of VEREP, the plan documents of the J&J severance plan, any other document in the record, any statute or any case law that would support these claims. All were before the 3rd Circuit Court of Appeals, (JA001-647).

In apparent reliance upon these asserted claims and May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997),[4] the 3rd Circuit erroneously found that VEREP and the J&J's severance benefits plan

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[4] In May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997), (cited by defendants below), all employees were terminated, the employer implemented an enhanced retirement program for workers over 55 **specifically** because of those terminations, all other employees received a severance. The employees over 55 were not eligible for the enhanced retirement program **prior to or independently of a contingent event unrelated to age**. Id. at 174-175. The instant case differs substantially, VEREP was a voluntary early retirement incentive plan, which prohibits involuntary retirement. Its purpose was to encourage Johnson & Johnson workers over the age of 50 to retire voluntarily during various eligibility periods and had nothing to do with job terminations. See *supra*, at pg.5-6.

were conditioned on terminations of employment and mutually exclusive and therefore, *"As we hold plaintiffs have not met their initial burden to prove adverse treatment we need not address 'safe harbor' arguments."* See op. at 15-17, App.14-15. See TS at App.125-126, ln.34-22. See DB at pg.21-24. This Court may note the 3rd Circuit erroneous finding is made notwithstanding the Panel's probative questions to defendants' counsel and counsel's answers indicating: VEREP was voluntary, available throughout the J&J Family of Companies and not conditioned on terminations of employment .See TS at App.123-124 ln.29-13, TS at 124 ln.31-39.

The 3rd Circuit, while acknowledging the extensive discussion by both parties and *amicus curiae,* the American Association of Retired Persons, of the "safe harbors" statutes of OWBPA, and the existence of "safe harbors" declined to examine the VEREP plan documents, the J&J severance plan documents and most importantly, ADEA 29 U.S.C. §621 *et seq*. See op. at 16-17, App.15.

In so doing the Court ignored the critical analysis that goes to the heart of petitioners' claim, namely that defendants violated ADEA, 29 U.S.C. §621 *et seq*., as a matter of law, by failing to follow the terms of their bona fide voluntary early retirement incentive plan, VEREP, statutorily controlled by OWBPA, which in turn compelled VEREP *eliminated* individuals to retire. See also CFR 1625.10 (d) (7) at App.142.

A grant of *certiorari* will afford the Supreme Court of the United States the opportunity to address and correctly resolve this point.

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*., prohibit the reduction or denial of severance to those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) or (ii) or §623 (*l*)(2)(A)? If so, were the conditions set

forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

COMPARE the statutory language set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A) with the congressional intent described *infra*.

The issue of whether an employer may deny severance benefits to older workers who receive pension benefits was of central concern to Congress in passing OWBPA. During the deliberations leading up to the enactment of the Act, Congress examined the same employers' policy that is present in the instant case and declared that denying severance to pension-eligible employees violates ADEA. Congress declared that, **"it is per se discrimination to use pension eligibility as a basis for denying an older worker any other benefits,"** H.R. Rep. No. 101-664, at 40.(emphasis added).

The Senate and House of Representatives with jurisdiction over OWBPA **"reaffirm[ed] that pension benefits may not be coordinated with severance payments."** (emphasis added). See S. Rep. No. 101-263, at 23; H.R. Rep. 101-664, at 10. Both Committees noted:

> The prohibition was designed to ensure that older employees who are entitled to certain age-related benefits are not penalized by having those earned benefits used as a basis for reducing or denying non age related benefits, This is particularly important in the area of severance benefits, where the courts of appeals consistently have held that the ADEA prohibits employers from reducing or denying severance pay based on pension eligibility. *See, e.g., EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984); *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984). The Committee specifically agrees with and reaffirms a **fundamental premise** of those holdings: **severance pay and pension benefits are not fungible**. S. Rep. No.101-263 at 22, H.R. Rep. No.101-664, at 38. (emphasis added)

Representative Augustus Hawkins, one of the chief sponsors of OWBPA, reaffirmed Congress' view that pension eligibility is an unlawful proxy for age: "... **pension eligibility** and **early retirement eligibility** continue to be **proxies for age**, and employment decisions based on such factors are unlawful under the ADEA." See EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir.1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984) (Remarks of Rep Hawkins), Leg. Hist. at 42, (emphasis added).

See also H.R. Rep. No. 101-664, at 40 ("[T]he bill does not, as a general matter, permit employers to deny or reduce severance based on pension eligibility."). See Leg. Hist. at 42-43, "Nor may an employer reduce or deny an individual's severance benefits based on his **pension eligibility** or pension receipt, except to the **limited extent under these amendments**." (Remarks of Rep. Hawkins) (emphasis added).

VEREP *eliminated* individuals were qualified for severance for at least three independent reasons:

1) Because severance was extended to other individuals eliminated, at least in petitioners' case, *supra*, at pg.7-8.

2) Because the Johnson & Johnson Severance Plan, in language complying with OWBPA's amendments qualified all these individuals for it. See App.49 at 4.1 (b) (ii) where, "*...except that a Participant whose employment is terminated as a result of an event listed in article 4.1(a) and who elects to retire under a retirement plan of the Company **shall be granted** severance pay hereunder;*" (emphasis added).

3) Because defendants themselves identified no less than 42 VEREP *eliminated* individuals, excluding petitioners, who qualified for it under J&J Severance Plan. See *supra*, at pg.7-9.

All VEREP individuals were qualified for VEREP whether their positions were eliminated or not. **It is the fact that the VEREP *eliminated* individuals were eliminated that qualified them for severance.** And the severance they qualified for, as a matter of law,

is necessarily on the same terms and conditions as the *others* and/or the minimum severance provided by terms of J&J's ERISA severance plan, 29U.S.C. §623 (a)(1), (2).

When a claim of unequal severance benefits based on age is made, OWBPA provides the employer with only three affirmative defenses, or "safe harbors":

1) The equal benefit analysis,[4] or that age related costs justify the difference in benefits, [5] 29 U.S.C. §623 (f)(2)(B)(i), **or**

2) The terms of an employee benefit plan or voluntary early retirement incentive plan are followed by the employer and the plan is consistent with the purposes of the chapter, 29 U.S.C. §623 (f)(2)(B)(i), (ii), **or**

3) The denial or reduction of severance satisfies one of OWBPA's explicit exceptions permitted by §623 (*f*)(2)(A).

The first affirmative defense, the equal benefit analysis or that age related costs justify the difference in benefits, can not be satisfied because:

a) It is undisputed that VEREP eliminated individuals received no severance while the *others* did.

b) There can be no age-related cost in providing a severance benefit to an individual where the formula is based on years of service and salary.

The second affirmative defense, that the terms of an employee benefit plan or voluntary early retirement incentive plan are observed by the employer and the plan is consistent with the purposes of the

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[4] "[E]ach discrete benefit (whether provided pursuant to an employee benefit plan or not) is subject to the prohibitions of 4(a)(1)." H.R. Rep. No. 101-664, at 33.

[5] "The only cost to be considered in determining compliance with these amendments is the actual cost of providing the challenged benefit to older workers." H.R.Rep. No. 101-664, at 35.

chapter cannot be satisfied because, as discussed *supra*, at pg.7-9, the VEREP *eliminated* individuals had no option of remaining employed, in violation of 29 U.S.C. §623 (f)(2)(A), (B)(i),(ii).

Also as discussed *supra*, at pg.19, the terms of the J&J severance plan mandated that severance be paid. The plan must have the statutory provisions to comply with OWBPA. Johnson & Johnson and the J&J Pension Committee failed to follow the terms of the severance plan where the severance benefits are applicable to **pension eligible** employees, and where the plan terms are statutorily controlled by OWBPA, not by ERISA. See Controlling Law, Article 8.2 at App.57, see Article 4.1 (b) (ii) at App.49, COMPARE both with U.S.C. §623 (f)(2)(B)(i), (ii), *29 U.S.C. §623(k), 29 U.S.C. §630(l).*

When an employer operates under any of these exceptions, OWBPA places the burden of proof on the employer when challenged in a civil action. See 29 U.S.C. §623(f)(2)(A), (B) (i), (ii) where: *"...An employer, employment agency, or labor organization acting under subparagraph (A) or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter;" or.....*

In the third affirmative defense, that the denial or reduction of severance satisfies one of OWBPA's explicit exceptions permitted by §623 (*l*)(2)(A), where the statutory language speaks with precision and specificity: *"It shall not be a violation of subsection (a), (b), (c) or (e) of this section solely because following a contingent event unrelated to age-"* [6], [7], [8] (emphasis added), §623 (*l*)(2)(A).

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[6] U.S. Representative Henry Clay: "Exceptions [to the OWBPA] were carefully crafted and should be narrowly construed, not used as the basis for creating further exceptions by analogy or otherwise." 136 Cong. Rec. **H8617** (daily ed. Oct. 2, 1990) (statement of Rep. Clay). (emphasis added). See also *Sexton v. Beatrice Foods*, 630 F.2d478, 486 (7th Cir. 1980) quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption from... remedial legislation must ... be narrowly construed giving due regard to the plain meaning of the statutory language and the

The word *solely* limits the exception to *a* (one) single event that is unrelated to age. This exception can not possibly apply to any VEREP *eliminated* individual because none were subjected to a single event unrelated to age.

a) Additionally, §623 (*l*)(2)(A), can not be satisfied because; The VEREP is undisputedly an age-related event, specifically retirement by only individuals in the age-protected class.
b) The entire VEREP package of benefits was made available because of an age-related event, specifically retirement by only individuals who had qualified for it independently of any job elimination. [7]

See also discussion of (JA189) App.86, under Question 2, *supra* at pg. 15-16.

Defendants have asserted there is no age-adverse treatment because the value of petitioners' VEREP is greater than the value that *others* received even if severance is combined with pension benefits *others* may have accrued, see DB at pg.18, 39-40, reprinted

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intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announce will of the people." (emphasis added)

[7]The purpose of **U.S.C. 623 (*l*) (2)** "emphasizes that coordination of severance and any age-related benefit is unlawful except as expressly provided in section 4 (*l*) (2)." Sen. Comm. On Labor and Human Resources, 102d Cong., Legislative History of the Older Workers Benefit Protection Act (1991) at 24. (emphasis added).

[8] Cf. Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 841 (1998) ("the Court is required to take Congress at its word with regard to the precise and detailed statutory strictures on a waiver of ADEA claims established by Title 2 of the ("OWBPA"); Cf. Long v. Sears Roebuck & Co., 105 F.3d at 1539 cert. denied 118 S. Ct. 1033 (1998) ("in enacting the OWBPA, Congress intended to occupy the area of ADEA releases and, in doing so to supplant the common law.").

at App.143, see DB at pg.33-37. In addition defendants have asserted, the J&J Severance Plan gives the Pension Committee the "sole discretion" to deny severance benefits for any reason and to determine that the "Service Benefit" an additional pension benefit included in the VEREP package, was petitioners' equivalent of a severance benefit they would have under the J&J severance plan, see DB at pg.28-31.See 3rd Cir op. at pg.10-11, App.10-11.

The District Court agreed and the 3rd Circuit Court of Appeals affirmed.

A grant of *certiorari* will afford the Supreme Court of the United States the opportunity to address and correctly resolve this point.

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq*., by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

In their complaints at count one, petitioners have asserted that they were entitled to severance pursuant to a qualified ERISA plan as sponsored by Johnson & Johnson and/or pursuant to a qualified plan published by their employer PPC, supra at pg.10.

In their complaints at count two, petitioners have asserted an ERISA class claim for similarly situated persons who at a time when they were scheduled for termination by Johnson & Johnson or one of its wholly owned subsidiaries elected to retire and were not paid a severance pursuant to the Johnson & Johnson Severance Plan, *supra* at pg.10.

Each petitioner protected his or her right for qualified ERISA plan benefits by following the terms of the plan and applied to the Johnson & Johnson Pension Committee for severance benefits. See ARTICLE

7, Claims Procedure (a) at App.55. Johnson & Johnson's Office of General Counsel informed each in exactly the same language:

"The decision has been made not to permit participation by an employee in both the Severance Plan and VEREP. [Therefore your] request for benefits under the Severance Plan have [sic] *been denied."*

See letters for Holder, Hawes, Muscarella, Kadam, App.102-108.

Each petitioner, again following the terms of the plan, appealed from the original denial. See ARTICLE 7, Claims Procedure at (c), App.56. Petitioners' appeals required the Pension Committee to respond, see ARTICLE 7, Claims Procedure at (e), App.56. Defendants acknowledged the receipt of these appeals. However, it is undisputed that no petitioner received a response to their appeal and that all petitioners exhausted the plan's administrative requirements. See petitioners' affidavits and exhibits attached thereto, App.112, ¶¶ 16-18 (JA169-170 at ¶¶ 16-18, Muscarella), (JA160-165 ¶¶ 10-12, Hawes), (JA192-193 ¶¶12-14, Kadam), (JA585-586 ¶¶ 18-20, Holder). See Opinion at App.35-36 (PB2-4-5).

The District Court abused its discretion in denying petitioners' motion for certification of an ERISA class pursuant to Fed. R. Civ. P. 23, on the basis that not all of the proposed class had applied to the plan administrator for severance benefits. The proposed class appeared to be subject to an affirmative defense that they failed to exhaust the plan's internal application process which would defeat typicality and therefore the defendants' asserted defenses may be different. See opinion at App.35-37, (PB2-4-5).

Petitioners submit to this Court, the only defense available to defendants in this case is one of the affirmative defenses provided by OWBPA's "safe harbors". That defense would necessarily apply to the class of VEREP *eliminated* individuals. See 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A). See discussions under Questions 1-3, *supra* at pg.11-22. As shown *supra*, these defenses can not be satisfied and defendants have not asserted any one of them.

Petitioners' ERISA class claim for severance would challenge the lawfulness of Johnson & Johnson and the Johnson & Johnson Pension

Committee's blanket disqualification policy for severance benefits on behalf of all VEREP *eliminated* individuals who were compelled to retire when their positions were eliminated.

The District Court found the proposed class satisfied all other requirements and particularly noted the numerosity requirement is satisfied because no less than **80** persons may fall within the class, some of which are non-residents of New Jersey. See App.35 (PB2-4).

Should this Court so find in Question 3 *supra*, the answer "yes" and "no" respectively, petitioners reiterate that, 29 U.S.C. 621 *et seq*. prohibits any decision to deny or reduce severance, where an age-protected individual is qualified, that is contrary to the exceptions as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A). They further reiterate that neither an employer, nor an ERISA plan administrator, nor a Court of Law may decide an issue contrary to these controlling statutes.

The proposed class members' applications for severance would be futile in the face of defendants' fixed severance benefit policy but also immaterial as a matter of law.

More importantly, the plan administrator's decision would be immaterial with regard to those applications and certification of the proposed ERISA class because it would exceed the administrator's "sole discretion" as a matter of law. The District Court's discretion to deny class certification can not hold, when based on an immaterial factor.

In the circumstances of this case ERISA class certification is mandatory as a matter of law.

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

It is undisputed that VEREP *eliminated* individuals, who were compelled to retire, did not receive severance benefits if they

received VEREP. It is also undisputed that policy was predetermined and maintained by the Johnson & Johnson Companies and the Pension Committee. These facts are evident from the documents of record as set forth below:

1) The only document of record that indicates any VEREP participant was given a choice between a severance package and VEREP is JA189 at App.86. The choice indicated on JA189 is a choice between PPC's severance pay package App.85 (JA171) (same as the release of all claims, see discussion *supra* pg.15-16) and VEREP. See DB at pg.14 at App.143. See discussion *supra*, at pg.7-8, see Hobson's choice at pg. 9.

2) The four letters denying severance in response to petitioners' applications came directly from the Johnson & Johnson Office of General Counsel and stated:

"...(he was)(you were) informed that ... (he)(you) could not participate in both the severance Plan and VEREP. .... (he) (you) chose to participate in VEREP."

The letters further stated that,

"The decision has been made not to permit participation by an employee in both the Severance Plan and VEREP. *[Therefore your] request for benefits under the Severance Plan have* [sic] *been denied."* (emphasis added) See supra, at pg.24, see four letters at App.102-108.

3) In failing to respond to petitioners' severance appeals the Pension Committee again ignored the mandates in the J&J severance plan. See *supra* at pg.23-24. See App.56 Article 7.1, (c), (d), (e).

4) The Affidavit of Joann Heffernan Heisen, a member of J&J's Pension Committee and Corporate Treasurer, at the time of petitioners' applications, App.96-99 (JA377-390) states at ¶ 4:

"Plaintiffs' applications for benefits under the Severance Plan were denied based upon the determination that such benefits

were not available *to persons who elected to receive and were receiving the substantial benefits and benefit enhancements provided under the Voluntary Early Retirement Enhancement Program ("VEREP"). This determination was made by members of the* ***Pension Committee with the advice of Johnson & Johnson's Office of General Counsel*** *acting as counsel to the Pension Committee."* (Emphasis added).

The Affidavit further states at ¶ 6:

"The letters denying Plaintiff's applications were sent on behalf of the Pension Committee pursuant to the delegation of authority to the Office of General Counsel and ***reflected the determination and decisions of members of the Pension Committee.*** *Further, the letters were sent* ***with the knowledge and approval of the Pension Committee****. I personally reviewed and approved the letters denying Ms. Hawes' and Mr. Kadam's benefit applications before they were sent. The contents of the letters denying Plaintiffs applications for benefits [were] also reviewed by* ***Efrem Dlugacz****, another member of the Pension Committee with* ***primary responsibility*** *for VEREP.* (emphasis added).

5) Mr. Efrem Dlugacz the J&J Corporate Director of Benefits at the time, authored the VEREP eligibility letters and sent those letters and the Q & A VEREP information package to all eligible individuals. See App.92-93, See Second Affidavit of Robert Muscarella, App.87-88 ¶¶ 3-5. See VEREP's Q & A's at (JA389-407)

6) See the Second Affidavit of Robert Muscarella, App.89-90 ¶¶ 9-16 and Exhibit I, reprinted herein at App.95, and Exhibit J at (JA510-511) which identify by name the members of the Pension Committee and their respective corporate positions at all times material to petitioners' claims, App.90-91 ¶¶10-16. (JA381-385). Summarily listed *infra*, they are:

Clark H. Johnson, Chairman of the Pension Committee, Chief Financial Officer of Johnson & Johnson, Member of the Board of

Directors and Member of the Executive Committee of Johnson & Johnson.

Efrem B. Dlugacz, Pension Committee Member and Director of Corporate Benefits.

Joanne Heffernan Heisen, Pension Committee Member and Corporate Treasurer of Johnson & Johnson.

Roger S. Fine, Pension Committee Member, Vice President of Administration of Johnson & Johnson and Member of Johnson & Johnson Executive Committee.

Robert E. Campbell, Member the Pension Committee, Vice Chairman, Johnson & Johnson Board of Directors.

Johnson and Johnson's corporate attorneys, Frank Bolden, Vice President Corporate Staff and Donna M. Malin both of the Office of General Counsel, authored letters to each petitioner denying their severance benefits on four separate occasions. See Affidavit of Joann Heffernan Heisen App.97-98 at ¶¶ 5-8. See Supplemental Affidavit of Joann Heffernan Heisen App.100-101 at ¶¶ 1-3. See denial letters at App.104-108.

Johnson and Johnson's severance policy as applied to VEREP *eliminated* individuals was not an ad hoc isolated decision made by one benefit administrator at one subsidiary company, such as JA189 at PPC. It was a corporate wide policy maintained by Johnson & Johnson, the Pension Committee Members and its delegation of their authority to the J&J Office of General Counsel. This policy as confirmed by the defendants, affected no less than **46** VEREP *eliminated* individuals, in no less than **six** of Johnson & Johnson's **30** participating companies. See *discussion supra*, at pg.7-8.

The corporate ranks of the Pension Committee Members are high, the scale of the reckless policy is broad and the "willful" standard as defined in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, is met.

In the circumstances of this case, liquidated damages are mandatory as a matter of law.

SUMMARY OF THE RATIONALE TO REVIEW AND FINAL ARGUMENTS

"The policy of the Older Workers Benefit Protection Act is ..... clear from its title. It is designed to protect the rights and benefits of older workers." Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 841 (1998) (emphasis supplied).

The "rights and benefits of older workers" are precisely what this case is about. See JA189, App.86 and Hobson's choice at pg.9, *supra*.

Each VEREP *eliminated* individual had a right to severance benefits because their position was eliminated, as a matter of law this right can not be taken away. Each VEREP *eliminated* individual had a right to a VEREP pension benefit, as a matter of law this right can not be taken away. Each right is the result of two solely independent events. As discussed *supra*, to require age protected individuals to chose between these two benefits rights violates ADEA, 29 U.S.C. §621 *et seq.* as a matter of law.

What is central in this case is that petitioners and prospective ERISA class members are all older workers, individuals who are age-protected by the statutory requirements of ADEA, as amended by OWBPA. Both lower Courts failed to recognize the significance of this central point. As discussed *supra*, it is ADEA, 29 U.S.C. §621 *et seq.*, that provides the controlling statutes where benefits are applied to age-protected individuals.

A simple examination of the District and 3rd Circuit Courts' analysis on which their opinions are based reveals the lower Courts' lack of understanding as to the extent and application of the protection afforded by statutes of ADEA, as amended by OWBPA. Both lower Courts began their analysis by first examining the ERISA claim, giving much weight to the administrators' "sole discretion" to determine benefits. As discussed *supra*, any determination contrary to the OWBPA's exceptions is immaterial where the benefit is applied to an age-protected individual.

The District Court, first citing, Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3rd Cir. 1991) [2] as holding that a reservation of authority to deny benefits in a severance plan does not violate ERISA, denied petitioners' ERISA claims, Hawes et al. v. Johnson & Johnson et al., No 94-5332, slip op. at 4-6. (DNJ Dec. 18,1995). App.27-29, (PB1-4 to7).

In determining petitioners' ADEA claims the District Court carried over its ERISA determination; the Court stated:

> To establish a prima facie case, plaintiff is required to prove that he or she was treated adversely based on age. DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 725-27 (3d Cir), cert. denied, 116 S. Ct. 306 (1995). **In the context of discretionary denial of benefits,** the Court should compare the benefits received by younger and older employees. (emphasis added) No 94-5332, slip op. at 7, App.30.

The Court ignored ADEA *29* U.S.C. 621 *et seq.* and relied on the "sole discretion" of the plan administrator to deny severance. The Court then concluded: **"Hence, plaintiffs have failed to state a valid claim of age discrimination."** No. 94-5332, slip op. at 8, App.30.

The 3rd Circuit Court in first determining petitioners' ERISA claims stated:

> If an ERISA plan grants the plan administrator (here the J&J Pension Committee) discretion in interpreting the plan's terms, a Court must review the administrators decision to either grant or deny benefits under the 'arbitrary and capricious' standard. See, e.g., Dewitt v. Penn-Del Directory 106 F.3d 514, 520 (3d Cir. 1997) [2]. There is little doubt that the J&J severance plan grants the J&J Pension Committee the requisite discretion so as to warrant this differential standard of review." Hawes et al. v. Johnson & Johnson et al., No. 98-6408, op. at 10 (3rd Cir. Oct. 20,1999). App.10.

In the 3rd Circuit analysis of petitioners' ADEA claim the Court stated:

> The named plaintiff argue that J&J treated older workers adversely by forcing them to choose between normal severance and retirement benefits and the enhanced retirement package known as VEREP, a choice not given to younger J&J workers. However, it appears that the named plaintiffs, and other workers over the age of fifty, were treated *more* favorably than their younger counterparts insofar as they were given a choice between two different options, one that provided benefits identical to those available to younger employees and another that provided *greater* benefits than were given to younger employees. Viewed from this perspective, the named plaintiffs cannot meet their burden to prove that J&J treated older workers less favorably than younger counterparts." *(emphasis in original),* (emphasis added), No 98-6408, op. at 13, App.12.

By first examining ERISA and not ADEA, both Courts demonstrated a lack of understanding as to how ADEA, as amended by OWBPA and ERISA employee benefit plans are wholly intertwined when applied to an age-protected individual.

This lack of understanding was fatal to any proper consideration and analysis of petitioners' claims.

When an age-related benefit claim is made under both ERISA and ADEA statutes, the age-related claim must be examined first, because as shown *supra,* any other method of proceeding to determination of such claims would be immaterial.

The 9th Circuit recognized this in Kalvinskas v. California Institute of Tech., 96 F.3d *supra,* at 1307, fn2:

> The District Court held that Kalvinskas' FEHA claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. SS 1001 et seq. Because we

---

[2]The 3rd Circuit decisions in Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3rd Cir. 1991) and Dewitt v. Penn-Del Directory 106 F.3d 514, 520 (3d Cir. 1997), did not consider the evidential import of any age-related claim.

hold that Kalvinskas is entitled to summary judgement on his ADEA claim, we need not reach the preemption question.

In the instant case, the 3rd Circuit also misunderstood the term "safe harbors" as evidenced by this language in the Court's opinion:

> Both parties, as well as *amicus curiae*, spend considerable amount of space in their briefs discussing the "safe harbors" from ADEA liability that Congress promulgated as part of OWBPA. See. e.g., 29 U.S.C. 623(f)(2)(B)(i) (articulating the "equal benefit, equal cost" defense). In essence, these provisions of the ADEA are affirmative defenses – they allow an employer to escape liability even if it[s] challenged benefit scheme treats older workers adversely to younger counterparts. As we hold that the named plaintiffs have not met their initial burden to prove adverse treatment, we need not address "safe harbors" arguments. (emphasis added) No. 98-6408, op. at 16, App.15.

What the Court has failed to realize here is, all employee benefits plans must comply with OWBPA and in so doing an employer's plan becomes the "safe harbor" for affirmative defenses. The "safe harbor" affirmative defense requires the employer, *"..to observe the terms of a bona fide employee plan..."*, 29 U.S.C. 623(f)(2)(B). If an employer fails to observe the terms of such plan when applied to an age-protected individual, the employer treats that individual adversely because of age. That is age discrimination.

Johnson & Johnson created (2) bona fide employee benefit plans. The J&J Severance Plan and the VEREP, two affirmative defenses, two "safe harbors". Each one had the necessary language to satisfy the statutory requirements of ADEA, as amended by OWBPA, specifically 29 U.S.C. 623(f)(2)(B)(i) and (ii) and in each of these affirmative defenses the statute places the burden of proof on the employer, see *supra*, pg.21. See statutes at App.132-133.

Defendants have never asserted or proved either affirmative defense. Nor can they.

COMPARE: the normality of asserting an affirmative defense, a "safe harbor", in "A", with the anomaly in "B":

A) When challenged by a VEREP individual, who retired voluntarily, with age-adverse treatment, the employer can simply assert the affirmative defense " ...[in] observe[ance] [of] the terms of a bona fide employee plan-", 29 U.S.C. 623(f)(2)(B), the individual retired voluntarily.

B) When challenged by a VEREP *eliminated* individual, who retired involuntarily, with age-adverse treatment, the employer can not assert the affirmative defense as in "A" but instead asserts **"...they were treated better, not worse,.."**, see DB at 18 & DB at 39-40, reprinted at App.143-144, see TS at App.119-121, ln.39-4, see TS at App.129 ln.21-36. The lower Courts then hold there is no age-adverse treatment, there is no *prima facie* case because petitioners have not met their initial burden. See 3rd Cir. op. at pg.17, App.15. See District Court op. at 8, App.30.

As discussed *supra*, defendants violated ADEA, 29 U.S.C. §621 *et seq*., as a matter of law for four independent reasons:

1) Because VEREP *eliminated* individuals did not have the same option as the other VEREP individuals because none had the option of remaining employed. *Supra*, pg.7. That is age discrimination.

2) Because VEREP *eliminated* individuals were compelled to retire, in violation of 29 U.S.C. 623 (f)(2)(B) (i), (ii). That is age discrimination.

3) Because 29 U.S.C. 623 (f)(2)(B)(i) **or** (ii) **or** 623 (*l*) (2)(A) can not be satisfied. That is age discrimination.

4) Because defendants failed to observe the terms of their Severance Plan and their VEREP when applying those benefit plans to VEREP *eliminated* individuals. That is age discrimination.

The 3rd Circuit Panel could have reached the conclusions that petitioners suggest here had the Panel not relied on defendants' bald assertions and not stopped its analysis short where it did. See also petitioners' petition, amended petition and supplement to amended petition for rehearing *en banc*, which cite with particularity the material facts and issues of law the Panel misapprehended. See Orders denying petitions at App.19-20. See also Transcript TS App.115-116 ln.18-4, App.119 ln.11-22, App.119-121 ln.39-4, App.121 ln.15-39, App.129 ln.7-36.

In passing OWBPA Congress identified pension eligibility as a proxy for age. See pages 18-19, *supra*. See also, the final reports of both the Senate and House of Representatives committees responsible for the passage of the Act who emphasized that "..pension benefits are age-related. Pension eligibility is proxy for age." S. Rep. No. 101-263 at 23; H.R. Rep. No. 101-664, at 40. (emphasis added)

In Hazen Paper Co. et al., v. Biggins, 507 U.S. 604 (1993), a decision[10/] involving an employment termination before the enactment of OWBPA this Court stated:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. *Id.*, at 612. (emphasis added)
>
> Nor do we rule out the possibility of dual liability under ERISA and ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service,... .....That

---

[10/]Interestingly this Court decided this case on April 20, 1993, well after the passage of OWBPA, the decision in Hazen turned on years of service rather than age. Biggins was fired in 1986. OWBPA was enacted prospectively on Oct.16,1990 as to employee benefit plans, and as to other conduct occurring after April 14, 1991. OWBPA could be of no use to Biggins even if age or pension status were factors.

case is not presented here. *Id.*, at 613. (emphasis added)

"That case is not presented here." The day to examine the "special case" and the issues identified in Hazen Paper has arrived.

The question left open in Hazen Paper is whether a "disparate impact" claim is cognizable under ADEA. In the instant case such a claim is viable, as established, *supra*:

When positions were eliminated, the employer and/or the J&J Pension Committee with reserved "sole discretion" could decide which individuals were to receive severance and which individuals would not. That is the stated facially neutral policy in this case.[11/]

1) *Others*, who were not eligible for VEREP received severance.

2) VEREP *eliminated* individuals did not receive severance.

3) The employer and/or Pension Committee's corporate severance policy and corporate policy statements: *"...not to permit participation in..."* and *"...benefits were not available to.."* or the "Hobson's choice" provided to petitioner(s) in JA189, only impacted age protected individuals with pension eligibility status namely the class of VEREP *eliminated* individuals.

When expressed in these simple terms, age discrimination as a result of disparate impact becomes apparent. The legislative history of OWBPA speaks to this also and closes the gap on the disparate impact theory left open by this Court in Hazen Paper, as established *supra*. OWBPA says:

1) Pension eligibility is a proxy for age.

2) Denial of a benefit based on a pension eligibility status is tantamount to denial of a benefit based on age.

[11/]Based on the "sole discretion" reserved by J&J's ERISA severance plan defendants could decide to reduce, deny or require a choice between severance benefits and VEREP but actually contrary to the mandate in that plan that severance benefits be paid to individuals who retired when their positions were eliminated.

Petitioners submit to this Court, the intent of Congress, *inter alia*, in enacting OWBPA was to make clear, as a matter of law, that pension eligibility is the statutory equivalent of age.

This disparate impact analysis is presented to this Court as an authoritative argument to the finding that the instant case merits review.

CONCLUSION

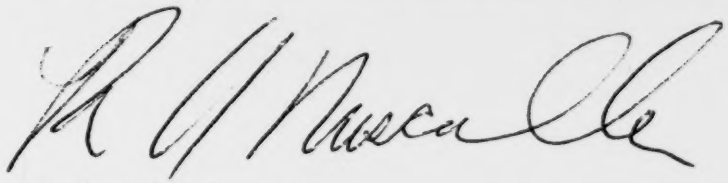
It is apparent the lower Courts in this case misunderstood the extent to which OWBPA's objective standards protect the benefit rights of age-protected individuals. See e.g., 29 U.S.C. 623 (f)(2)(B) ("equal benefit, equal cost"). In the instant case the standards used by both lower Courts for the determination of age-adverse treatment and a *prima facie* case ignored the mandates of OWBPA.

Congress enacted the OWBPA amendments on Oct.16, 1990, nearly ten years ago in response to this Court's decision in Ohio Pub. Employees Retirement System v. Betts, 492 U.S. 158 (1989). The lower Courts' decisions in this case effectively nullified those statutory amendments.

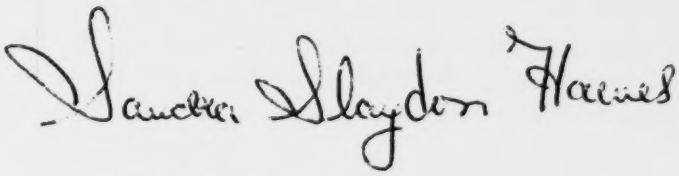
Petitioners seek the Court's guiding authority and supervisory powers first, to provide the necessary standards in OWBPA case law that will guide the Federal Courts in determining age discrimination in employee benefits, and second to correct the wide spectrum of legal error and injustice existing below.

Petitioners pray that this Court exercise its judicial discretion in favor of granting *certiorari* to review the instant case.

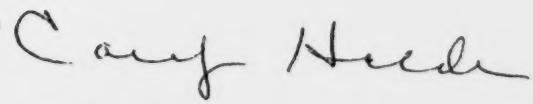
Respectfully submitted by each named petitioner *pro se* ,



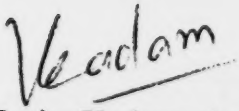
Robert A. Muscarella



Sandra Slaydon Hawes



Carolyn Holder



Vanita Kadam, the estate of Manohar B. Kadam

Dated: MAY 15 2008

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[1] May it please the Court, by information provided by the Clerk of Court, Petitioners are informed, the RULES of the Supreme Court of the United States, adopted January 11, 1999, effective May 3, 1999, do not prohibit inclusion of a TRANSCRIP which has not been certified.

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Supreme Court, U.S.
FILED
MAY 15 2000
OFFICE OF THE CLERK

No. 99-1850

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
pro se, on behalf of themselves and class of similarly situated persons,

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I APP. 1-43

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-6408

SANDRA SLAYDON HAWES, Plaintiff on behalf of herself and classes of similarly situated persons

V.

JOHNSON & JOHNSON;
THE SEVERENCE PLAN OF JOHNSON & JOHNSON AND AFFILIATED COMPANIES, ITS PLAN ADMINISTRATOR; PAUL J. RIZZO; JOAN G. COONEY; PHILIP M. HAWLEY; ROGER B. SMITH, in their official capacities;
XYZ COMPANIES, the not yet identified affiliates of the Johnson & Johnson and affiliated Companies Severance Plan; MCNEIL-PPC, INC., also known as Personal Products Company, a New Jersey Corporation;
JOHNSON & JOHNSON WORLDWIDE ABSORBENT PRODUCTS, MATERIALS & RESEARCH, an unincorporated affiliate of Johnson & Johnson;
THE JOHNSON & JOHNSON PENSION COMMITTEE;
JOHNSON & JOHNSON MEDICAL, INC.;
JOHNSON & JOHNSON MERCK CONSUMER PHARMACEUTICALS CO., a New Jersey Corporation;
JOHNSON & JOHNSON ORTHOPEDICS, INC., a New Jersey Corporation;
JOHNSON & JOHNSON SERVICES, INC., a New Jersey Corporation;
LIFESCAN, INC., a California Corporation;
MCNEIL SPECIALTY PRODUCTS COMPANY;
NORAMCO, INC., a Georgia Corporation;
ORTHO PHARMACEUTICAL CORP., a Delaware Corporation;
ORTHO BIOTECH, INC., a New Jersey Corporation;
SITE MICROSURGICAL SYSTEMS, INC., a Pennsylvania Corporation;

R.W. JOHNSON PHARMACEUTICAL RESEARCH INSTITUTE, an unincorporated entity doing business in New Jersey;
JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.;
ABSORBENT PRODUCTS & MATERIALS RESEARCH;
ADVANCED CARE PRODUCTS, INC., a New Jersey Corporation;
CELLULOSE PRODUCTS CORP., a New Jersey Corporation;
CODMAN & SHURTLEFF, INC.;

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CRITIKON, INC., a Florida Corporation;
ETHICON, INC., an Ohio Corporation;
ETHICON ENDO-SURGERY, an unincorporated entity doing business in Ohio;
IMMUNOBIOLOGY RESEARCH INSTITUTE, INC.;
IOLAB CORPORATION, a California Corporation;
VALENTINA JANSSEN PHARMACEUTIC, INC.;
JANSSEN RESEARCH FOUNDATION;
JOHNSON & JOHNSON ADVANCED MATERIALS COMPANY, a New Jersey Corporation;
JOHNSON & JOHNSON FINANCE CORPORATION, a New Jersey Corporation;
JOHNSON & JOHNSON HEALTH MANAGEMENT, INC., a New Jersey Corporation;
JOHNSON & JOHNSON HOSPITAL SERVICES, INC., a New Jersey Corporation;
JOHNSON & JOHNSON INTERNATIONAL SYSTEMS COMPANY, a New Jersey Corporation

(Newark, New Jersey District Civil 94-5332)

ROBERT A. MUSCARELLA; MANOHAR B. KADAM, Plaintiffs on behalf of themselves and classes of similarly situated persons

V.

JOHNSON & JOHNSON, a New Jersey Corporation;
SEVERANCE PLAN OF JOHNSON & JOHNSON AND AFFILIATED COMPANIES, ITS PLAN ADMINISTRATOR;

PAUL J. RIZZO; JOAN G. COONEY; PHILIP M. HAWLEY;
ROGER B. SMITH, Committee members, in their official capacities;
XYZ COMPANIES, the not yet identified affiliates of the Johnson & Johnson and Affiliated Companies Severance Plan;
MCNEIL-PPC, INC., a/k/a
PERSONAL PRODUCTS COMPANY, a New Jersey Corporation;
JOHNSON & JOHNSON CONSUMER PRODUCTS, INC., a New Jersey Corporation;
JOHNSON& JOHNSON WORLDWIDE ABSORBENT PRODUCTS & MATERIALS &RESEARCH, an unincorporated affiliate of Johnson & Johnson;
JOHNSON & JOHNSON PENSION PLAN COMMITTEE

(Newark, New Jersey District Civil No. 95-4351)

[end of page 2]

CAROLYN HOLDER, on behalf of herself and classes of similarly situated persons

V.

JOHNSON & JOHNSON;
THE SEVERANCE PLAN OF JOHNSON & JOHNSON AND AFFILIATED COMPANIES, ITS PLAN ADMINISTRATOR;
JOHNSON & JOHNSON PENSION COMMITTEE;
MCNEIL-PPC., INC., also known as Personal Products Company;
JOHNSON & JOHNSON WORLDWIDE ABSORBENT PRODUCTS & MATERIALS RESEARCH, an unincorporated division of Johnson & Johnson, and as class actions defendants, the affiliates of the Severance Plan of Johnson & Johnson and Affiliated Companies;
JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.;
JOHNSON & JOHNSON VISION PRODUCTS, INC.;
"A"-COMPANY, a Johnson & Johnson Company;
ADVANCED CARE PRODUCTS, INC.;
CELLULOSE PRODUCTS CORP.;
CODMAN & SHURTLEFF, INC.;
CRITIKON, INC.;
ETHICON, INC.;

ETHICON ENDO-SURGERY, an unincorporated entity doing business in Ohio;
IMMUNOBIOLOGY RESEARCH INSTITUTE, INC.;
IOLAB CORPORATION;
JANSSEN PHARMACEUTICAL, INC.;
JANSSEN RESEARCH FOUNDATION, an unincorporated entity;
JOHNSON & JOHNSON ADVANCED MATERIALS COMPANY;
JOHNSON & JOHNSON DEVELOPMENT CORPORATION;
JOHNSON & JOHNSON FINANCE CORPORATION;
JOHNSON & JOHNSON HEALTH MANAGEMENT,INC.;
JOHNSON & JOHNSON HOSPITAL SERVICES, INC.;
JOHNSON & JOHNSON INTERNATIONAL;
JOHNSON & JOHNSON INTERNATIONAL SYSTEMS COMPANY; JOHNSON & JOHNSON MEDICAL, INC.;
JOHNSON & JOHNSON MERCK CONSUMER PHARMACEUTICALS CO.;
JOHNSON & JOHNSON ORTHOPEDICS, INC.;
JOHNSON & JOHNSON SERVICES, INC.;
LIFESCAN, INC.;
MCNEIL CONSUMER PRODUCTS CO.;
MCNEIL SPECIALTY PRODUCTS COMPANY;
NORAMCO, INC.;
ORTHO BIOTECH, INC.;
ORTHO DIAGNOSTIC SYSTEMS, INC.;
ORTHO PHARMACEUTICAL CORP.;
SITE MICROSURGICAL SYSTEMS, INC.;
R.W. JOHNSON PHARMACEUTICAL RESEARCH INSTITUTE, an unincorporated entity doing business in New Jersey;
THERAKOS, INC.

(Newark, New Jersey District Civil No. 95-4351)

[end of page 3]

(Newark, New Jersey District Civil No. 95-4351)

Sandra Slaydon Hawes, Robert A. Muscarella,
and the Estate of Manohar Kadam,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
District Judge: Honorable Nicholas H. Politan

Argued
Wednesday, September 22, 1999

BEFORE: BECKER, Chief Judge, GARTH, Circuit Judge
and POLLAK,* District Judge

(Opinion Filed: OCT. 20 , 1999)

Carol H. Alling (Argued)
Selikoff & Cohen, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233

Counsel for Appellants, Slaydon Hawes.
Robert A. Muscarella, Estate of Manohar
Kadam and Carolyn Holder

Francis X. Dee (Argued)
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street

---

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[end of page 4]

Newark, New Jersey 07102

Attorneys for Appellees
Johnson & Johnson. et als.

Sally Dunaway
Laurie A. McCann
AARP Foundation Litigation

Melvin Radowitz
American Association of Retired Persons
601 E Street, NW
Washington, D.C. 20049

Attorneys for Amicus Curiae. American
Association of Retired Persons

MEMORANDUM OPINION OF THE COURT

GARTH, Circuit Judge:

Appellants, Sandra Slaydon Hawes, Robert Muscarella, the estate of Manohar B. Kadam, and Carolyn Holder,[1] sought damages and other equitable relief from their former employer, Johnson & Johnson, pursuant to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), the Age Discrimination in Employment Act ("ADEA"), and the New Jersey Law Against Discrimination ("LAD"). On appeal, the named plaintiffs argue that the District Court erred in dismissing their causes of action that

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[1]This opinion will refer to appellants collectively as "named plaintiffs."

[end of page 5]

arose from certain Johnson & Johnson decisions concerning the distribution of employee benefits. We will affirm the judgment entered by the District Court.

I

The District Court exercised jurisdiction over the named plaintiffs' federal claims pursuant to 28 U.S.C. § 1332, and over pendent state claims pursuant to 28 U.S.C. § 1367. We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291. As all issues raised on appeal concern matters of law, our review is plenary.

II

Each of the named plaintiffs were employed as a part of the engineering department of the McNeil-Personal Products Company ('TPC"), a subsidiary of Johnson & Johnson ("J&J"), in 1993. In August of that year, PPC announced that it was closing its engineering department effective October 30, 1993. At this time, each of the named plaintiffs were covered by both the J&J severance plan and the J&J retirement plan.

The J&J severance plan provides covered employees with benefits, upon the occurrence of a "severance event," in the form of two weeks of base pay for each year of service, capped at a total of 104 weeks of pay. Under section 4.1 of the plan, a "severance event" occurs as the result of "i. position elimination; ii. A Participant's inability to meet the requirements of his or her position; iii. reduction in force; or iv. for such other reasons as the Pension Committee may, in its sole *discretion,* deem appropriate." (emphasis added). Importantly, however, section 4.2 declares that those who retire are not eligible for

[end of page 6]

severance benefits, "except that a Participant whose employment is terminated as a result of an event listed in Article 4. 1 (a) and who elects to retire under a retirement plan of the Company shall be granted severance pay." Finally, section 5. 1 (d) entitles the Pension Committee to "in its sole *discretion,* authorize a reduction in the severance pay to a Participant hereunder by the amount of any discharge, dismissal, or severance allowance or similar payment to which the Participant is or shall be entitled." (emphasis added)

Soon after announcing the closing of the engineering department, J&J offered both the named plaintiffs and any others

who were negatively impacted by the closing an opportunity to receive a different severance package. For many, this alternative package would provide an amount above and beyond that which was available under the general J&J severance plan, but it was only available if the employee signed a waiver releasing all claims against J&J. Both parties concede that none of the named plaintiffs signed such a waiver so as to qualify for this special severance package.[2]

Further, before the PPC engineering department actually closed its doors, J&J announced a new program entitled "Voluntary Early Retirement Enhancement Program" ("VEREP"). Employees were eligible for VEREP if the subsidiary for which they worked agreed to participate in the program, they were already vested in another J&J retirement

[end of page 7]

[2]At oral argument, counsel for the named plaintiffs argued that they failed to sign the appropriate waiver because a member of J&J's management staff had advised them that such a waiver was not necessary. The record before this Court, however, fails to reflect such a assertion.

plan, were over the age of fifty, and had completed seven years of service with the company. VEREP's benefit provisions can be divided into three different categories: (1) pension benefits; (2) medical and life insurance benefits; and (3) service benefits. VEREP added five additional years of credit to an individual's age and added three years credit to the individual's service with the company, actions that greatly increased the amount of pension benefits to which the employee would otherwise have been entitled under the general J&J retirement plan. An employee who elected VEREP also would become immediately eligible for medical benefits at the time of his or her retirement, rather than having to wait to achieve the age of fifty-five. Finally, VEREP provided employees with a "service benefit," a cash payment calculated by multiplying the employee's years of service with the company by two weeks of base pay, capped at fifty-two weeks of compensation.[3]

Each of the named plaintiffs opted to partake in VEREP, and as a result of this participation, they received service benefits in the

following amounts: Hawes: $20,092; Muscarella: $67,800; Kadam: $60,200; Holder: $7,823.16. Despite receiving these payments, each of the named plaintiffs also applied for severance benefits under the J&J general severance plan. J&J denied each request, stating that all J&J employees had been

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[3]Although the cap under VEREP is lower than that under the general severance plan, J&J asserts that the VEREP cap did not apply to any of the named plaintiffs. Once again, however, the record before this Court, fails to reflect such a claim.

[end of page 8]

informed that they could not participate both in VEREP and also receive severance pay under the J&J plan.[4]

Hawes, Muscarella, and Kadam filed three separate actions against J&J between November 2, 1994, and August 16, 1995, in the United States District Court for the District of New Jersey. The three actions were consolidated through an amended complaint filed on May 26, 1995. Holder filed a separate action on August 16, 1995, which the District Court consolidated with the others on January 31, 1996. Each action alleged violations of ERISA, ADEA, and the LAD.[5]

The District Court granted J&J summary judgment on the named plaintiffs' ERISA, ADEA, and LAD claims insofar as such claims were based on J&J's failure to pay severance benefits. The District Court denied the plaintiffs' petition for class certification after referring the petition to a Magistrate Judge and receiving his report and recommendation. Ultimately, the District Court dismissed the remaining claims brought by

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[4] The record does not indicate the method by which J&J transmitted this information to its employees generally. At oral argument, however, counsel for J&J asserted that seminars were held to educate employees about VEREP's terms, and at these sessions, J&J staff advised employees that they could not participate in VEREP and also receive general severance benefits. The record does indicate that one of the named plaintiffs, Mr. Muscarella, was provided with this information both verbally and in writing. App. at JA189.

[5] The named plaintiffs' claims of discrimination under the ADEA and the LAD stem from allegations that J&J both forced the named plaintiffs to choose between severance benefits and participation in VEREP and chose the named plaintiffs for

termination rather than transfer on the basis of age and gender. Only the former of these claims has been appealed to this Court.

[end of page 9]

Hawes and Holder, and proceeded to trial on Muscarella and Kadam's remaining claims. After the jury returned a verdict in favor of J&J on September 23, 1998, this timely appeal ensued.

III

We first turn to the named plaintiffs' allegation that J&J violated ERISA in refusing to pay benefits under the J&J severance plan to those employees, including themselves, who chose to participate in VEREP. ERISA provides employees with a vehicle by which they may bring an action against their employer for amounts they allege to be due under an employee benefit plan governed by the statute. See 29 U.S.C. § 1132(a)(1)(B). If an ERISA plan grants the plan administrator (here, the J&J Pension Committee) discretion in interpreting the plan's terms, a court must review the administrator's decision to either grant or deny benefits under the "arbitrary and capricious" standard. See. e.g., Dewitt v. Penn-Del Directory 106 F.3d 514, 520 (3d Cir. 1997). There is little doubt that the J&J severance plan grants the J&J Pension Committee the requisite discretion so as to warrant this deferential standard of review. See J&J Severance Plan § 4.1(a), (b) (stating that the events that trigger the payment of severance benefits, as well as those events that disqualify an employee from severance benefits, can be dictated by the Pension Committee "in its sole discretion"); § 5. 1 (d) (stating that reductions in severance pay as the result of the payment of other benefits are to be authorized by the Pension Committee "in its sole discretion"). As such, we "must uphold [the] plan interpretation even if [we] disagree[] with it, so long

[end of page10]

as the administrator's interpretation is rationally related to a valid plan purpose and is not contrary to the plain language of the plan." Dewitt 106 F.3d at 520; see also Gillis v. Hoecht Celanese Corp., 4 F.3d 1137, 1141 (3d Cir. 1993).

J&J's rationale for denying the named plaintiffs' application for severance benefits is that such benefits were already provided as a part of VEREP as the "service benefit"; indeed, J&J argues,

identical formulae were used to calculate both the severance benefit and VEREP's "service benefit." In this respect, J&J invokes section 5.1(d) of the J&J severance plan, which allows the J&J Pension Committee to reduce an employee's severance pay in an amount equal to any other "similar benefit" that the employee receives. The named plaintiffs retort that the "service benefit" is not similar to severance pay because the "service benefit" is paid out of different J&J assets, is paid via an annuity rather than a simple cash payment, and implicates different tax consequences for recipient employees.

The named plaintiffs' arguments elevate, quite literally, form over substance. The fact that a J&J employee's severance benefits are calculated in the exact same fashion as his or her service benefit under VEREP indicates that the employee's "bottom line" for either benefit is identical. This fact alone renders the two different benefits "similar" in nature so as to justify J&J's decision to reduce the named plaintiffs' severance pay by the amount of the "service benefit." Because the two benefits were calculated identically, the named plaintiffs receipt of VEREP's "service benefit" authorized J&J to offset severance benefits completely.

[end of page 11]

We therefore hold that J&J's decision to equate the VEREP "service benefit" with benefits offered under the J&J severance plan so as to cause an offset in the named plaintiffs' severance benefits was rational and therefore not arbitrary and capricious.[5]

IV

The named plaintiffs also appeal the District Court's dismissal of their claims under the ADEA and the LAD, insofar as such claims allege that J&J unlawfully discriminated against older workers by requiring them to choose between severance benefits and VEREP participation.[7]

The ADEA prohibits discrimination "with respect to ... compensation, terms, conditions, or privileges of employment, because of [an] individual's age." 29 U.S.C. § 623(a) (l). Before 1990, however, an employer could only be held liable for unlawful age discrimination with regard to employee benefits if the employee could prove that the benefit system at issue was meant to be a

"subterfuge" with respect to the prescriptions on age discrimination. See Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 165-66 (1989). As the result of the Supreme Court's holding in Betts, however, Congress passed

[6]The named plaintiffs also appeal the District Court's denial of ERISA class certification. Such an appeal, however, is rendered moot by our holding that the named plaintiffs themselves do not possess a viable ERISA cause of action.

[7] For purposes of this appeal, the analysis under both the ADEA and the LAD is the same. See Turner v. Schering-Plough Corp., 901 F.2d 335, 341 (3d Cir. 1990) (stating that the LAD "utilizes the same analytical framework as is applicable under the ADEA" (citing Shaner v. Horizon Bancorp, 561 A.2d 1130 (N.J. 1989); Goodman v. London Metals Exchange, Inc., 429 A.2d 341 (N.J. 1981))).

[end of page 12]

the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 (1990), which enacted wholesale changes to ADEA's liability scheme. Although OWBPA removed language mandating that plaintiffs prove that an employer was attempting to "subterfuge" ADEA provisions through a particular employee benefit scheme, it did not change the fundamental tenet of any discrimination claim - that an employer treat members of a protected class (here, those over the age of forty) adversely. See 29 U.S.C. § 623(a)(1).

The named plaintiffs argue that J&J treated older workers adversely by forcing them to choose between normal severance and retirement benefits and the enhanced retirement package known as VEREP, a choice not given to younger J&J workers. However, it appears that the named plaintiffs, and other workers over the age of fifty, were treated *more* favorably than their younger counterparts insofar as they were given a choice between two different options, one that provided benefits identical to those available to younger employees and another that provided *greater* benefits than were given to younger employees. Viewed from this perspective, the named plaintiffs cannot meet their burden to prove that J&J treated older workers less favorably than younger counterparts. Indeed, the District Court, after a rather cursory analysis, found that "plaintiffs were treated better than the younger employees because VEREP entitled them to immediate receipt of their pension benefits and additional medical benefits."

[end of page 13]

The named plaintiffs' argument runs deeper, however. The named plaintiffs argue that they had vested in *both* the severance plan and VEREP, and therefore they were entitled to *both* severance pay as a part of the J&J general severance plan and VEREP's service benefit. Because participation in VEREP was premised on achieving the age of fifty, forcing such workers to choose between severance and VEREP benefits when they had vested in both programs, according to the named plaintiffs, constitutes unlawful age discrimination.

As support for this proposition, the named plaintiffs cite this Court's opinion in EEOC v. Westinghouse Elec. Co., 869 F.2d 696 (3d Cir. 1989) (generally known as Westinghouse II - We held in Westinghouse II that once an employee had vested in both a *severance* and a *pension* plan, an employer may not condition early retirement on a limitation of severance pay by the amount of pension benefits to which an employee was entitled. See id. at 705. In other words, once vested in both plans, an employer may not lawfully force older workers to choose between the two types of benefits as a condition of early retirement, especially when younger workers who were not eligible for early retirement were not obligated to make such a choice. See id.

The Supreme Court vacated our holding in Westinghouse II and remanded the matter back to this Court for reconsideration in light of its decision in Betts. In enacting OWBPA, Congress explicitly referenced the Westinghouse line of cases with approval. See. e.g. S. Rep. No. 101-263, at 22, reprinted in. 1990 U.S.C.C.A.N. 1509, 1527. The

[end of page 14]

named plaintiffs claim that Congress's rejection of Betts and its endorsement of the Westinghouse line of cases reaffirms our decision in Westinghouse II.[8] We ultimately need not reach this issue, however, because even assuming that Westinghouse II serves as binding precedent, its holding does not assist the plaintiffs in proving that J&J engaged in adverse treatment towards older workers.

In Westinghouse II we held that an employer could not condition early retirement upon a deduction of vested *severance benefits* by the amount of vested *pension benefits* to which the employees were already entitled when younger employees could choose to take their vested severance benefits without affecting their pension benefits, which would vest in the future. In this respect, the named plaintiffs' ADEA claim becomes intertwined with their EPJSA claim. As stated earlier, section 5.1(d) of the J&J general severance plan authorized J&J, in its sole discretion, to offset severance benefits by similar payments such as the VEREP service benefit. This provision serves to defeat the named plaintiffs' ERISA claim, and it is equally harmful to their ADEA claim. Even if the named plaintiffs were vested in both *plans*, they were never entitled to, or, in other words, never vested in both types of *benefits*. As a result, J&J did not deduct *vested* severance benefits from *vested* pension benefits.

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[5]This Court has yet to render an opinion on this issue since Congress enacted OWBPA, although one panel has suggested that the OWBPA *might* have resurrected Westinghouse II.

[end of page 15]

Nor did J&J give younger employees any type of advantage over their older cohorts; in fact, they did quite the opposite. Older employees, such as the named plaintiffs, could choose between either their normal pension rights, which they would be entitled to in the near future, and severance pay (as younger employees were forced to do), or they could take under VEREP's more attractive package, which included immediately available enhanced early pension benefits, enhanced retiree insurance benefits, and service benefits that were in many respects the functional equivalent of severance benefits. In this case, older employees were indeed the favored class. Cf., May v. Shuttle, Inc., 129 F.3d 165, 174-75 (D.C. [APP] Cir. 1997) (per curiam) (holding that plaintiffs failed to establish a prima facie case of age discrimination when plaintiffs' only evidence of age discrimination was that older, retirement eligible employees were given the choice of taking a lesser option or a

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better option, and younger employees could only receive the lesser option). Westinghouse II therefore is inapposite. We therefore hold that J&J did not treat its older employees adversely in forcing them to choose between participation in VEREP (and receipt of its "service benefit") and general severance pay.

Both parties, as well as amicus curiae American Association of Retired Persons, spend a considerable amount of space in their briefs discussing the "safe harbors" from ADEA liability that Congress promulgated as a part of OWBPA. See. e.g. 29 U.S.C. § 623(f)(2)(B)(i) (articulating the "equal benefit, equal cost" defense). In essence, these provisions of the ADEA are affirmative defenses - they allow an employer to escape

[end of page 16]

liability even if it a challenged benefit scheme treats older workers adversely to younger counterparts. As we hold that the named plaintiffs have not met their initial burden to prove adverse treatment we need not address "safe harbor" arguments.

V

For the foregoing reasons, the District Court orders granting summary judgment to J&J on the named plaintiffs' claims under ERISA, the ADEA, and the LAD, dated December 22, 1995, and May 9, 1996, are affirmed. Consequently, the named plaintiffs' petition for class certification under ERISA is moot, and therefore the District Court's order denying such petition, dated February 28, 1996, is also affirmed.

TO THE CLERK:

Please file the foregoing opinion.

s/s Garth

Circuit Judge

[end of page 17, end of opinion]

(Newark, New Jersey Civil No. 95-4351)

Sandra Slaydon Hawes, Robert A. Muscarella,
and the estate of Manohar Kadam,

Appellants

On Appeal from the United District Court
for the District of New Jersey
District Judge: Honorable Nicholas H. Politan

Argued
Wednesday, September 22, 1999.

BEFORE. BECKER, Chief Judge, GARTH, Circuit Judge and POLLAK, District Judge*

JUDGEMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on Wednesday, September 22, 1999.

On consideration whereof, it is now here ADJUDGED AND ORDERED by the court that the orders of the District Court filed December 22, 1995, and May 9, 1996, granting Johnson & Johnson summary judgement, and February 28, 1996 denying the

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*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[end of page]

petition of Sandra Slaydon Hawes, Robert A. Muscarella, The estate of Manohar B. Kadam, and Carolyn Holder for class certification, be the same are hereby affirmed.

ATTEST:

s/s P. Douglas Sisk

Clerk

DATED: OCT 20 1999

Certified as a true copy and issued in lieu of formal mandate on January 10, 2000.

Teste: s/s P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit.

[end of page, end of Judgement]

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 United States Courthouse
601 Market Street
Philadelphia PA 19106-1790

P. Douglas Sisk
Clerk

Telephone
215-597-5017

January 10, 2000

Mr. William T. Walsh, Clerk
United States District Court for the District of New Jersey
50Walnut Street
Martin Luther King Jr., Federal Building & Courthouse
Newark, NJ 07101

Re: Docket No. 98-6408
Hawes vs. Johnson & Johnson
D. C. Civil Nos. 94-cv-05332, 94-cv-06203 95-cv--04351

Dear Mr. Walsh:

Enclosed is a certified copy of the judgement in the above-entitled case(s), together with copy of the opinion. The certified judgement is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

( ) We return herewith the certified record in the case(s).

(X) We release herewith the certified list in lieu of the record.

Kindly acknowledge receipt for same on the attached copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgement is also enclosed showing costs taxed, if any.

Enclosure
cc:
Carol H. Alling, Esq.
Francis X. Dee, Esq.
Sally P. Dunaway, Esq.

P. DOUGLAS SISK, Clerk
s/s Laura L. Davis
By: Laura L. Davis
Case Manager

BEFORE: BECKER, Chief Judge, SLOVITER, MANSMANN
GREENBERG, SCIRICA, NYGAARD, ALITO,
McKEE, RENDELL, BARRY and GARTH* Circuit Judges
and POLLAK,* District Judge.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellants and having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

BY THE COURT:

s/s Becker

Chief Judge

DATED: DEC. 30 1999

LD/cc: CHA RAM
SPD SSH
FXD

*As to panel rehearing only.

*As to panel rehearing only.

[end of page, end of order]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 8, 1999

No. 98-6408

Re: Hawes vs. Johnson & Johnson

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, MCKEE, RENDELL, BARRY, AND GARTH, Circuit Judges, AND POLLAK, District Judge.

1. Motion filed by Appellants Pro se for leave to file Amended Petition for Rehearing En Banc.

2. Motion filed by Appellants Pro se for leave to supplement the Amended Petition for Rehearing En Banc.

3. The Memorandum Opinion was filed and Judgment entered on 10/20/99

s/s

Laura L. Davis, Case Manager
Direct Dial 597-5017

ORDER

The foregoing motion is granted, nunc pro tunc*

* This order was signed prior to the entry of the order denying rehearing but was inadvertently not filed. The order denying rehearing took into consideration and was intended to speak on all Petitions for rehearing (including amended petitions)

Dated: JAN 13 2000

By the Court,
s/s Rendell
Circuit Judge

LD/cc: CHA, RAM,
SPD, SSH, FXD [end of page, end of Order]

APP.21-23 PAGES PURPOSELY ABSENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA and MANOHAR B. KADAM,

Plaintiffs,

v.

JOHNSON & JOHNSON, et al,

Defendants.

CIVIL ACTION NO. 94-5332 (NHP)

HON. NICHOLAS H. POLITAN

ORDER

ORIGINAL FILED
DEC. 22,1995
WILLIAM T. WALSH, CLERK

This matter having come before the Court on the crossmotions of the parties for partial summary judgment pursuant to Fed.R.Civ.P. 56, and the Court having heard oral argument on December 5, 1995, and considered the matter and the submissions of the parties, and good cause having been shown,

IT IS on this 18th day of December, 1995 hereby

ORDERED that defendants' motion is GRANTED, and it is further

ORDERED that plaintiffs' motion is DENIED.

s/s
NICHOLAS H. POLITAN
U.S.D.J.

ENTERED
On
THE DOCKET
on 12-26-1995
WILLIAM T. WALSH, CLERK
By s/s
(Deputy Clerk)

PB 1-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHLOS H. POLITAN
JUDGE

MARTIN LUTHER KING, JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST. ROOM 5076
P.O. BOX 999
NEWARK, N. J. 07101-0999

NOT FOR PUBLICATION

December 18, 1995

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

Carol H. Sapakie, Esq.
Selikoff & Cohen
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
Attorneys for Plaintiffs
Muscarella, Kadam and Slaydon

Stephen F. Payerle, Esq.
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Attorneys for Defendants

Re: Hawes v. Johnson & Johnson
Civil Action No. 94-5332 (NHP)

Dear Counsel:

This matter comes before the Court on the cross-motions the parties for partial summary judgement pursuant to Fed.R. Civ.P. 56. Oral argument was heard on December 5, 1995, and I reserved decision. For the reasons stated herein, plaintiffs' motion is DENIED and defendants' motion is GRANTED.

[end of page] **PB 1-2**

STATEMENT OF FACTS

Plaintiffs' were employees of Personal Products Company ("PPC"), a wholly owned subsidiary of defendant Johnson &: Johnson. On August 20, 1993, plaintiffs were informed that their positions at PPC were being eliminated at the end of October of the same year. Plaintiffs were told that they were eligible for severance. Subsequently, PPC announced that its salaried employees who were over the age of fifty and had at least seven years of service were qualified to participate in defendants, Voluntary Early Retirement Enhancement Program ("VEREP"). Because VEREP provided them with additional benefits and immediate retirement monies, plaintiffs chose to accept VEREP rather than the standard severance.

Plaintiffs filed this action on November 2, 1994, challenging the policy of defendant which required them to chose between VEREP and the standard severance plan. In Counts one through five of their Second Amended Complaint, plaintiffs allege that defendants deprived them of their severance benefits in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), and discriminated against them on the basis of ace in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") and the New Jersey Law Against Discrimination ("LAD") The present motions followed.

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[1]The plaintiffs are Robert Muscarella, Manohar Kadam, and Sandra Slaydon Hawes. They have moved to have themselves certified as a class action. The motion is presently under review.

[end of page 2]

DISCUSSION

Standard of Review

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment may only be granted if, drawing all inferences in favor of the nonmoving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 896 (3rd Cir. 1987), cert. dismissed, 483 U.S. 1052 (1987). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, for which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986), cert. dismissed, 484 U.S. 1066 (1988). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Id. Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial," or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), cert. denied, 481 U.S. 1029 (1987). The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586. Speculation, conclusory allegations, and mere denials are not enough to raise genuine issues of material facts.

[end of page 3] **PB 1-4**

II ERISA

Plaintiffs argue that they are entitled to benefits from both the severance plan and VEREP. Defendants, on the other hand, assert that plaintiffs voluntarily chose to participate in VEREP rather than the severance plan. Plaintiffs argue that forcing them to make such a choice violates ERISA. The Court does not agree.

An employee does not have a right to severance in the absence of the employer's contractual agreement to provide it upon termination. See Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3d Cir. 1991) (citing Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276, 279 (3d Cir. 1984) and Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 283 (3d Cir. 1988)), cert. denied, 503 U.S. 938 (1992). In the instant matter, defendant Johnson & Johnson adopted a severance plan. See Severance Plan & Summary Plan Description. Article 4 of the plan described the eligibility requirements for severance. Id. at 4. Under the plan, one whose employment is terminated through retirement is not entitled to severance except where the termination is a result of certain enumerated reasons, including position elimination. Id. at § 4.1(b)(ii). Defendants assert that plaintiffs were not terminated, but were given the option to retire by taking VEREP; therefore, § 4.1(b)(ii) is not applicable to plaintiffs.

Assuming arguendo that plaintiffs were involuntarily terminated, defendants argue that other provisions in the plan

[end of page 4] **PB 1-5**

give defendants discretion not to pay the benefits listed in § 4.1(b)(ii). Section 4.3 of the plan provides:

> The Pension Committee shall, in its sole discretion, determine whether or not a Severance Event has occurred with respect to a Participant and may impose such other eligibility conditions on payment of benefits hereunder as it may deem advisable. The Pension Committee shall have absolute discretion in interpreting or applying the terms of this Plan.

Id. at § 4.3 (emphasis added).

Defendants urge that this provision allows them to provide plaintiffs with a choice between participating in the severance plan or VEREP. The Third Circuit, in Hamilton, held that a reservation of authority in a severance plan does not violate ERISA, "as long as that limitation is explicitly stated as part of the plan."

Hamilton, 945 F.2d at 77-78. Plaintiffs, at oral argument, admitted that there is nothing in ERISA which prohibits case-by-case interpretations of a severance plan when such discretion in clearly set forth in the plan. The Court finds that the language of 9 4.3 of defendants' severance plan clearly reserves to defendants the right to deny severance in certain circumstances. Discretionary decisions of an employer to deny severance benefits are reviewed under the arbitrary and capricious standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Under this standard, "the decision maker's determination to deny benefits must be upheld unless it was 'clear error' or not 'rational'." Gillis v. Hoechst Celanese

[end of page 5] **PB 1-6**

Corp., 4 F.3d 1137, 1141 (3d Cir. 1993), cert. denied, 114 S. Ct. 1369 (1994).

In the case sub judice, there is nothing irrational about defendants' decision to deny plaintiffs severance after they chose to participate in VEREP. If plaintiffs had not elected VEREP, then under the severance plan they would be entitled to severance, health benefits, and vested pension rights. Upon election of VEREP, however, plaintiffs received more benefits --they were awarded immediate receipt of their retirement benefits and additional medical benefits. Accordingly, the Court holds that defendants, decision to deny severance to employees who participated in VEREP was not arbitrary and capricious.

III. **ADEA**

Plaintiffs argue that by forcing plaintiffs, who were over age fifty, to choose between the severance plan and VEREP constitutes age discrimination because the younger employees were not required to make the same election. Plaintiffs assert that if they chose to take-VEREP, they were forced to give up severance which the younger employees received. Defendants illustrate, however, that if plaintiffs had chosen to accent severance, like the younger employees, they would have received the same amount and would not have jeopardized their vested pension rights. Instead, plaintiffs

were allowed to chose an early retirement plan which provided them with more financial reward than the severance plan.

[end of page 6] **PB 1-7**

ADEA prevents an employer from "discriminat [ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The order and allocation of proof in an age discrimination case is governed by the three-part test set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), for Title VII cases, and accepted by the Third Circuit for use under ADEA. See, e.g., Chipollini, 814 F.2d at 897-898. First, plaintiff must make out a prima facie case. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the employer carry the burden, the plaintiff must show by a preponderance of the evidence that the proffered reason is actually a pretext for discrimination. Turner v. Schering-Plough Corp., 901 F.2d 335, 341-42 (3d Cir. 1990) (citing Burdine v. Texas Dept. of Community Affairs, 450 U.S. 248, 252-53 (1981).

To establish a prima facie case, plaintiff is required to prove that he or she was treated adversely based an age. DiBiase v. SmithKline Beecham Co., 48 F.3d 719, 725-27 (3d Cir.), cert. denied, 116 S. Ct. 306 (1995). In the context of discretionary denial of benefits, the court should compare the benefits received by younger and older employees. See McCambridge v. Bethlehem Steel Corp., 873 F. Supp. 919, 926 (E.D. Pa. 1994).

[end of page 7] **PB 1-8**

In the present case, plaintiffs were treated better than the younger employees because VEREP entitled them to immediate receipt of their pension benefits and additional medical benefits. Neither older nor younger employees were allowed toparticipate in both VEREP and the severance plan. Hence, plaintiffs have failed to state a valid claim of age discrimination.[2]

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is **GRANTED** and plaintiffs' cross-motion for summary judgment is **DISMISSED.**

An appropriate order accompanies this Opinion.

s/s

NICHOLAS H. POLITAN

U.S.D.J.

---

[2]Plaintiffs claim of age discrimination based on New Jersey Law Against Discrimination ("LAD") is premised on the same facts as their claim under ADEA. Hence, for the reasons stated above, plaintiffs' LAD claim also fails.

The Court notes that defendants also move to dismiss the LAD claim on the theory of ERISA preemption. While the Court does not find it necessary to address that issue, the Court recognizes that plaintiffs have not contested that point of defendants' motion.

[end of page 8] **PB 1-9**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA and MANOHAR B. KADAM,
Plaintiffs,

v.

JOHNSON & JOHNSON, et al,
Defendants.

CIVIL ACTION NO. 94-5332 (NHP)

HON. NICHOLAS H. POLITAN

ORDER

FILED
Feb 28,1996
AT 8:30 11:30 aM
WILLIAM T. WALSH
CLERK

This matter having come before the Court on the Report and Recommendation of Magistrate Judge Ronald J. Hedges recommending the denial of plaintiffs' motion for class certification, and the Court having considered the matter as well as the objections of plaintiffs submitted thereto, and for the reasons appearing more particularly in the Letter Opinion of this Court and good cause having been shown,

IT IS on this 28th day of February, 1996 hereby

ORDERED that that the Report and Recommendation of Magistrate Judge Ronald J. Hedges is hereby ADOPTED, and it is further

ORDERED that plaintiffs' motion for certification is DENIED.

s/s

NICHOLAS H. POLITAN
U.S.D.J.

PB 2-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHLOS H. POLITAN
JUDGE

MARTIN LUTHER KING, JR.
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NOT FOR PUBLICATION

FILED
Feb 28,1996
At 8:30 11:30 aM
WILLIAM T. WALSH
CLERK

February 28, 1996
LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Attorneys for Defendants

Re: Hawes v. Johnson & Johnson
Civil Action No. 94-5332 (NHP)

Dear Counsel:
This matter is presently before the Court on the Report and

Recommendation of Magistrate Judge Ronald J. Hedges, filed January 30, 1996, recommending that plaintiffs'[1] motion for class certification pursuant to Fed.R.Civ.P. 23 be denied. Plaintiffs have submitted objections to the Report and Recommendation, which are discussed herein. For the reasons stated below, the findings and recommendations of the Magistrate

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[1]The named plaintiffs are Robert Muscarella, Manohar Kadam and Sandra Slaydon Hawes.

[end of page] **PB 2-2**

Judge are adopted by this Court, and the motion is **DENIED.**

The complaint arises out of plaintiffs' participation in an early retirement program offered by defendants. Plaintiffs were employees of Personal Products Company ("PPC"), a wholly owned subsidiary of defendant Johnson & Johnson. On August 20, 1993, plaintiffs were informed that their positions at PPC were being eliminated at the end of October of the same year. Plaintiffs were told that they were eligible for severance. Subsequently, PPC announced that its salaried employees who were over the age of fifty and had at least seven years of service were qualified to participate in defendants' Voluntary Early Retirement Enhancement Program ("PPC")). Because VEREP provided them with additional benefits and immediate retirement monies, plaintiffs chose to accept VEREP rather than the standard severance.

Plaintiffs filed this action on November 2, 1994, challenging the policy of defendant which required them to chose between VEREP and the standard severance plan. In Counts one through five of their Second Amended Complaint, plaintiffs allege that defendants derived them of their severance benefits in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), and discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") and the New Jersey Law Against Discrimination ("LAD").

On December 5, 1995, the Court heard oral argument on the cross-motions of the parties for partial summary judgment pursuant to Fed.R.Civ.P. 56, and reserved decision. On December

[end of page 2] **PB2-3**

[22], 1995, the Court denied plaintiffs' motion and granted defendants, motion. Plaintiffs also made a motion for class certification pursuant to Fed.R.Civ.P. 23. On January 30, 1996, Magistrate Judge Hedges recommended that plaintiffs, motion be denied.[2]

In his report, the Magistrate Judge analyzed the standard for class certification set forth in Rule 23(a). See Fed.R.Civ.P. 23(a). The Court agrees with Magistrate Judge Hedges, determination that the numerosity requirement is satisfied because over eighty persons may fall within the class, some of which are non-residents of New Jersey. Furthermore, the Magistrate Judge concluded that the commonality requirement was met. The Court acknowledges that plaintiffs' common claim is simply whether they are entitled to severance in addition to the benefits received under the early retirement program.

The Magistrate Judge, however, concluded that plaintiffs were unable to satisfy the requirements of typicality and adequacy of representation. Plaintiffs, admit that not all potential class members requested severance and were thereafter denied. The potential plaintiffs who did not request severance would have to prove that such an effort would have been futile. Requiring the present plaintiffs to prove an element of a claim

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[2]In their objections, plaintiffs make reference to a number of facts which they argue were incorrectly reported by the Magistrate Judge. See Plaintiff's objections I.A, I.B, I.C, I.D, I.E. The Court, in its recitation of the facts above, has corrected any discrepancy in the facts reported by the Magistrate Judge.

which is not necessary to their claim defeats typicality. See General Tele. Co. of the Southwest v. Falcon,-457 U.S. 147, 158 (1982). For the same reason, named plaintiffs may place insufficient emphasis on the defenses asserted by defendants against these potential plaintiffs. See Zinberg v. Washington Bankcorp, Inc., 138 F.R.D. 397, 408 (D.N.J. 1990). Likewise, the named plaintiffs cannot provide adequate representation if their interest may be antagonistic to those of the class. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir.), cert. denied , 421 U.S. 1011 (1975). Therefore, the Court

finds, as did the Magistrate Judge, that the requirements of typicality and adequacy of representation cannot be satisfied.

Furthermore, Magistrate Judge Hedges acknowledged that class certification under the Age Discrimination in Employment Act ("ADEA") merely requires a showing that the named plaintiffs are "similarly situated" to class members. 29 U.S.C. § 626(b). The Court concurs with the finding of the Magistrate Judge that plaintiffs are not similarly situated because the facts surrounding their choice of the early retirement program and, therefore defenses which may be asserted by defendants are different.

Plaintiffs object to the Magistrate Judge's finding that the class members' failure to exhaust administrative remedy defeats the typicality requirement. Plaintiffs urge the Court to employ a "creative procedural solution" to the exhaustion requirement by administratively terminating the case while the class members

[end of page 4] **PB 2-5**

pursue administrative remedies. Plaintiffs cite two cases for this unique proposition. The Court, however, does not find these cases persuasive. In Communications Workers of America v. American Telephone and Telegraph Co., the court was not dealing with a motion for class certification. See 40 F.3d 426 (D.C. Cir. 1994). Rather, the court reversed the district court's excuse of exhaustion to the plaintiffs, and dismissed the plaintiffs claim without prejudice. Id. at 433-34. Furthermore, the court emphasized that waiver of the exhaustion requirement was appropriate only in exceptional circumstances. Id. at 432.

Likewise, plaintiffs, reliance on Tomczscyn v. Teamsters, Local 115 Health & Welfare Fund is misplaced. See 590 F. Supp. 211 (E.D. Pa. 1984). In Tomczscyn, the district court was not analyzing the viability of a class action. Rather, the court was presented with the defendant's motion for summary judgment based on the plaintiffs' failure to exhaust administrative remedies. Id. at 212-13. The court granted defendant's motion, but in light of the defendant's failure to properly notify the plaintiffs of their right to an appeal the administrative decision, the court provided the plaintiffs sixty days to complete their appeals. Id. at 217. No such unique circumstances are present in the case sub judice.

Furthermore, the Court is unpersuaded by the case cited by plaintiffs, Weiss v. York Hospital, 745 F.2d 78G (3d Cir. 1984), cert. denied, 470 U.S. 10GO (1985). In Weiss, the proposed class of plaintiffs consisted of physicians who were discriminated by

[end of page 5] **PB 2-6**

the defendant's discriminatory hospital admissions policy. Id. at 810-11. Unlike the case at hand, the defendant did not argue that the class of plaintiffs would be subject to different defenses than the named plaintiff. Subsequently, the Third Circuit has clarified that just because the plaintiffs are asserting a common claim does not mean that their interest are satisfactorily aligned for class action purposes. In Re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 800 (3d Cir. 1995).

The Court is also unpersuaded by plaintiffs' argument that they will be required to present evidence of futility to prove their own claims for punitive damages. The fact that similar evidence can be used to prove two different claims does not mean that the class plaintiffs, interests will be vigorously represented. As such, the typicality and adequacy of representation requirements cannot be satisfied.

Finally, the Court is satisfied that the requirements for class certification under ADEA and LAD are not met. While the Third Circuit acknowledged that the existence of different defenses does not Automatically vitiate joinder, the court did not require joinder either. Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 52 (3d Cir. 1989). Rather, the Third Circuit merely reiterate that the decision is one for the court after careful deliberation. Id. After such analysis in the instant case, the Court concludes that the "similarly situated" standard

[end of page 6] **PB 2-7**

for class certification under ADEA or LAD are not met.[3]

I have fully reviewed the Magistrate Judge's Report and Recommendation and have conducted a de novo review of the record. Based upon my review, I accept and adopt the findings and recommendations of the Magistrate Judge. Accordingly, I hereby direct that plaintiffs' motion is **DENIED.**

An appropriate Order accompanies this opinion.

s/s

NICHOLAS H. POLITIAN
U. S. D. J.

---

[3]In their final objection, plaintiffs object to the Magistrate Judge's recommendation that, even if plaintiffs were similarly situated, class certification should be denied because of failure to provide adequate notice to defendants. The Court finds that this was an alternative grounds for denying class certification, and not necessary to the initial finding that the "similarly situated" standard has not been satisfied. Therefore the Court need not address this argument.

[end of page 7] _ **PB 2-8**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES, et al, Plaintiffs, v JOHNSON & JOHNSON, et al, Defendants.	CIVIL ACTION NO. 94-5332 HON. NICHOLAS H. POLITAN ORDER
CAROLYN HOLDER Plaintiff, v. JOHNSON & JOHNSON, et al, Defendants.	CIVIL ACTION NO. 95-4351 **FILED** MAY 09,1996 AT 8:30 ...11.....M WILLIAM T. WALSH CLERK

This matter having come before the Court on the crossmotions of the parties for partial summary judgment pursuant to Fed.R.Civ.P. 56, and the Court having considered the matter and the submissions of the parties, and good cause having been shown,

IT IS on this 9th day of May, 1996 hereby

ORDERED that defendants' motion is GRANTED, and it is further

ORDERED that plaintiff Counts one through five of plaintiff's Complaint are DISMISSED.

s/s
NICHOLAS H. POLITAN
U.S.D.J

ENTERED
on
THE DOCKET
on 5-13-1996
WILLIAM T. WALSH, CLERK
By s/s
(Deputy Clerk)

PB 3-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHLOS H. POLITAN
JUDGE

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NOT FOR PUBLICATION

FILED
MAY 09, 1996
AT 8:30 ...11.....M
WILLIAM T. WALSH
CLERK

May 9, 1996

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Attorneys for Defendants

Re: Hawes v. Johnson & Johnson
Civil Action No. 94-5332 (NHP)

Dear Counsel:

This matter is presently before the Court on defendants' motion for partial summary judgement of plaintiff Carolyn Holder's Complaint, pursuant to Fed.R. Civ.P. 56. No oral argument

was heard in accordance with Fed.R.Civ.P. 78, For the reasons stated herein, defendants' motion is GRANTED.

This Complaint arises out of the same facts which are the

[end of page] **PB 3-2**

subject of the litigation before this Court in Hawes v. Johnson & Johnson, No 94-5332 (D.N.J.). [1] In sum, plaintiff was an employee of Personal Products Company ("PPC"), a wholly owned subsidiary of Johnson & Johnson. On August 20, 1993, plaintiff was informed that her position was being eliminated at the end of October of the same year. Plaintiff was told that she was eligible for severance. Subsequently, PPC announced that its salaried employees who were over the age of fifty and had at least seven years of service were qualified to participate in defendants' Voluntary Early Retirement Enhancement Program ("VEREP"). Because VEREP provide her with additional benefits and immediate retirement monies, plaintiff chose to accept VEREP rather the standard severance.

Plaintiff filed this action on August 16, 1995, challenging the policy of defendants which required her to chose between VEREP and the standard severance plan. In Counts one through five of her Complaint, plaintiff alleges that defendants deprived her severance benefits in violation of the Employee Retirement Income Employment Act of 1974 ("ERISA"), and discriminated against her on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") and the New Jersey Law Against Discrimination ("LAD").

On December 12, 1995, in the Hawes case, the Court granted defendants' motion to dismiss Counts one through five of the

---

[1]This action was consolidated with the Hawes action-on January 26, 1996, pursuant to an order of Magistrate Judge Ronald J. Hedges.

[end of page2] **PB 3-3**

plaintiffs' Complaint.[2] Defendants now move for partial summary judgment to dismiss Counts one through five of the Holder Complaint for the same reasons previously enumerated by the Court in Hawes. See Hawes v. Johnson & Johnson. et al, No. 94-5332 (D.N.J. Dec. 18, 1995).

The causes of action asserted by plaintiff in Counts one through five of her Complaint are identical to those asserted by the same Counts in the Hawes Complaint. Therefore, unless the Court is persuaded that the facts surrounding plaintiff Holder's Complaint are relevantly different, there is no basis upon which the Court could hold differently. See Carteret Sav. Bank, F.A. v. Shushan, 721 F. Supp. 705, 706 (D.N.J. 1989), modified on other grounds, 919 F-2d 225 (3d Cir. 1990).

The only factual distinction asserted. by plaintiff is that she was fifty-five years of age and had nine years of service with the company; therefore, plaintiff f contends that she was already entitled to any normal early retirement benefit plan offered by defendants.[3] Plaintiff, however, fails to illustrate

---

[2]Defendants did not simultaneously move for partial summary judgment in this case because the motion papers in Hawes were filed before the Holder Complaint was served on November 17, 1995.

[3]Plaintiff asserts an additional argument for denying defendants' motion for partial summary judgment. Plaintiff asserts that the Court's previous decision of December 18, 1995, did not completely dismiss Counts one through five of the Hawes Complaint. Rather, plaintiff contends that there still remains a viable claim for separation pay.

Plaintiff misinterprets the Court's opinion. The Court construed those Counts in the Hawes' Complaint, and likewise the Holder Complaint, to assert a cause of action for severance benefits and age discrimination based on the failure to pay those

[end of page 3] **PB 3-4**

the significance, if any, of this factual distinction. The Court's previous decision to grant summary judgment was based on the fact that the persons who chose VEREP rather than severance were economically advantaged. Furthermore, the Court held that there was no evidence of age discrimination because the older employees, plaintiffs, were treated better than the younger employees, i.e. received more money.

Accordingly, for the same reasons annunciated by the Court in Hawes v. Johns & Johnson, No. 94-5332 (D.N.J. Dec. 18, 1995), defendants' motion for partial summary judgment is GRANTED, and Counts one through five of plaintiff Holder's Complaint are DISMISSED.

An appropriate order accompanies this Opinion.

s/s

NICHOLAS H. POLITAN

U.S.D.J.

benefits. The Court does not find a colorable claim for separation pay any where in Counts one through five of the Complaints. Therefore, the Court's previous decision dismissed Counts one through five in their entirety.

[end of page 4] **PB 3-5**

3
FILED
991850 MAY 15 2000
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
pro se, on behalf of themselves and class of similarly situated persons,

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II APP. 44-95

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[1] May it please the Court, by information provided by the Clerk of Court, Petitioners are informed, the RULES of the Supreme Court of the United States, adopted January 11, 1999, effective May 3, 1999, do not prohibit inclusion of a TRANSCRIP which has not been certified.

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SEVERANCE PLAN AND SUMMARY PLAN

DESCRIPTION of

JOHNSON & JOHNSON AND AFFILIATED COMPANIES

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ARTICLE 1
General

1.1 Purpose - This Severance Pay Plan and Summary Plan Description is being established by Johnson & Johnson to provide separation pay under certain circumstances to Participants whose employment with the Company is terminated under a Severance Event contained in Article 4.1. The sole purpose for payment of benefits under this Plan is to assist Participants when they are unemployed during the transition period when they are attempting to secure a new position.

1.2 Funding - Plan benefits shall be paid from the general assets of the Johnson & Johnson company employing the Participant.

1.3 Effective Date - This Plan shall become effective on the date it is executed.

1.4 Prior Documents - This Plan shall supersede all prior guidelines, plans, policies, practices, arrangements, etc., pertaining to severance pay, separation, pay or termination pay in effect prior to the effective date of this Plan.

ARTICLE 2
Definitions

2.1 Administrator - The "Administrator" of this Plan shall be the Pension Committee.

2.2 Company - The "Company" is Johnson & Johnson and includes any of its wholly-owned subsidiaries listed on Exhibit A hereof.

2.3 Compensation - "Compensation" shall mean a Participant's base salary or rate in effect upon the occurrence of the Participant's Severance Event.

2.4 Eligibility Employee - An "Eligible Employee" is a participant who meets all the eligibility requirements of Article 3.

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2.5 Participant - A "Participant" is a regular full-time salary or hourly employee of the Company who is not a member of a bargaining unit (unless the Company has agreed through collective bargaining to include such unit in the Plan.)

2.6 The Pension Committee - The "Pension Committee" is a Committee named by the Board of Directors of Johnson & Johnson to administer and supervise employee benefit plans of the Company.

2.7 Plan - The "Plan" means the Severance Plan and Summary Plan Description of Johnson & Johnson and Affiliated Companies as set forth herein and as amended from time to time.

2.8 Plan Sponsor - The "Plan Sponsor" is Johnson & Johnson.

2.9 Plan Year - A "Plan Year" is the calendar year except that the first Plan year is the period beginning on the Effective Date and ending an the following December 31.

2.10 Severance Event - A "Severance Event" is the involuntary termination of a Participant's employment with the Company, as defined further in Article 4.1(a) and not excluded in Article 4.1(b).

2.11 Year of Service - A "Year of Service" is a twelve month period of employment as an Eligible Employee. An approved leave shall be considered as a period of

employment for purposes of this Section 2.9 provided the Participant returns to actual service immediately upon completion of the approved leave. Should the Participant not return to active service immediately following an approved leave, the period of approved leave shall not be considered as a period of employment for purposes of this Section 2.9

ARTICLE 3
Participation

3.1 Participation Requirements - Participation in the Plan is available to all Participants as defined in Article 2.5 as of the Effective Date.

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ARTICLE 4
Eligibility for Benefits

Severance Events

(a) Subject to Section 4.2, a Participant shall be eligible for the benefits provided in Article 5 if his or her employment with the Company is involuntarily and permanently terminated as the result of any one of the following events:

i. position elimination;

ii. A Participant's inability to meet the requirements of his or her position;

iii. reduction in force, or

iv for such other reasons as the Pension Committee may, in its sole discretion, deem appropriate.

(b) A Participant, is not eligible for the benefits provided in Article 5 if his or her employment is terminated as a result of any one of the following events:

i. voluntary resignation;

ii. Retirement (except that a Participant whose employment is terminated as a result of an event listed in Article 4. 1 (a) and who elects to retire under a retirement plan of the Company shall be granted severance pay hereunder;

iii. the merger, divestiture or other sale of all or part of a business unit of the Company;

iv. the Participant refuses a position with the Company, which, in

[end of page 6] **100006**

the sole opinion of the Pension Committee, is comparable to or higher than the Participant's current position;

v. layoff;

vi. discharge for (i) misconduct, (ii) a violation of Company rules, policies, and/or practices or (iii) conduct considered by the Pension Committee to be detrimental to the Company.

vii. The Pension Committee reserves the absolute discretion to deny severance pay to any individual who obtains comparable employment with another employer after termination of her or his employment from the Company.

viii. Such other reasons as the Pension Committee shall, in its sole discretion, determine to be cause for denying benefits under this Plan.

4.2 Severance Pay for Collective Bargaining Units

Severance pay, if any, for Participants covered by a collective bargaining agreement will be governed by the specific provisions of such agreement. Unless a collective bargaining agreement specifically and expressly incorporates this Plan, employee covered by said agreement will not be eligible to participate in this Plan.

4.3 Determination of Eligibility

The Pension Committee shall, in its sole discretion, determine whether or not a Severance Event has occurred with respect to a Participant and may impose such other eligibility conditions on payment of benefits hereunder as it may deem advisable. The Pension Committee shall have absolute discretion in interpreting or applying the terms of this Plan.

ARTICLE 5
Amount and Payment of Benefits

5.1 Amount of Benefits Subject to Article 5.4

Participants who experience a Severance Event and who satisfy all eligibility conditions of Article 4 hereof, shall be eligible to receive compensation under the following Severance Pay Schedule:

(a) Benefit Formula: Two (2) weeks of compensation Per Year of Service

(b) Minimum Benefit:

i. Non-Exempt 4 weeks of compensation

ii. Non-Bonus Exempt 8 weeks of compensation

iii. Bonus Exempt 12 Weeks of compensation

(c) Maximum Benefit: 104 weeks of compensation

(d) The Pension Committee may, in its sole discretion, authorize a reduction in the severance pay to a Participant hereunder by the amount at of any discharge, dismissal, or severance allowance or similar payment to which the Participant is or shall be entitled by reason of any law, regulation, ruling, legal proceeding, other Plan of Company, or other plan to which the Company directly or indirectly contributes, to the extent that such amount is not attributable to the Participant's own contributions

(e) Unemployment Compensation -- The amount of any unemployment compensation benefits paid by the Company, directly or indirectly, while severance payments are being made hereunder will be deducted from said severance pay.

5.2 Other Benefits

Eligibility for other benefits will be determined in accordance with the appropriate documents describing those benefits where appropriate.

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5.3 Schedule and Timing of Severance Payment

Payment of severance pay hereunder shall commence to a Participant as soon as practicable after separation from the Company. Payments shall be made in accordance with the Participant's normal payroll schedule (i.e., weekly, bi-monthly, monthly) until all benefits have been paid, except that the Company reserves the right to prepay benefits in such lesser period of time (including payment in a lump sum) as selected by the Company.

5.4 Forfeitability of Benefits

Nothing in this Plan shall be construed as giving any Participant or beneficiary a non-forfeitable or vested right to any benefits hereunder. The Company may discontinue benefits otherwise payable to a Participant who obtains other employment or to a Participant or beneficiary who does not abide by the eligibility conditions posed by the Pension Committee pursuant to Section 4.3.

5.5 Death of Participant

If a Severance Event occurs by which a Participant becomes eligible for severance pay under the Plan, but the Participant dies prior to payment of all such severance pay, the Participant's beneficiary, as designated on his or her group life insurance enrollment form, shall be entitled to receive the balance of the severance pay but all benefits under Section 5.2 shall cease upon the Participant's death, except to the extent otherwise provided in the applicable plan or as required by law. If the designated beneficiary is no longer alive, payments shall be made to the Participant's surviving spouse or, if the Participant has no surviving spouse, to such surviving heir or heirs of the Participant in such amount or amounts as the Pension Committee shall determine in its sole discretion.

ARTICLE 6
Administration

6.1 The Employment Retirement Income Security Act of 1974

This Plan is a welfare Plan as defined in the Employee Retirement Income Security Act of 1974 ("ERISA") and is funded by the Company's assets.

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6.2 Named Fiduciary

Johnson & Johnson is the Named Fiduciary of the plan and the plan sponsor.

Address: One Johnson & Johnson Plaza
New Brunswick, New Jersey
08933

Telephone: (908) 524-0400

6.2 The Plan Administrator

The Pension Committee appointed by the Board of Directors of Johnson & Johnson is the Plan Administrator.

Address: One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933

Telephone: (908) 524-0400

6.4 Power and Duties of the Administrator

The Pension Committee shall have the authority to control and manage the operation and administration of the Plan, including all rights and powers necessary or convenient to carry out its functions hereunder, whether or not such rights and powers are specifically enumerated herein. Without limiting the generality of the foregoing, and in addition to

the other powers set forth in this Plan, the Pension Committee shall have the following express authority:

(a) To construe and interpret the Plan and decide all questions concerning length of Company Service, the existence of a Severance Event and eligibility for participation and benefits, as well as any other questions concerning the interpretation or application of its terms.

(b) To prescribe procedures to be followed by Participants for applying for benefits hereunder;

(c) To prepare and distribute, in such manner as the as he pension Committee determines to be necessary or appropriate, information explaining the Plan;

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(d) To receive from the Company and from Participants such information as shall be necessary for proper administration of the Plan.

(e) To amend or terminate the Plan in whole or in part at any time without prior consultation or notice to Participants;

(f) To consult with counsel, accountants, actuaries or other advisors (who may also be advisors for the Company) and also the services of employees and agents of the Company in the discharge of its responsibilities; and

(g) To delegate its authority hereunder.

6.5 Pension Committee Members as Participants

Members of the Pension Committee may also be Participants but they shall not make any discretionary decision or take any action affecting themselves as Participants unless such decision or action is upon a matter that affects all other similarly situated Participants and confers no special right, benefit, or privilege on the members of the Pension Committee not simultaneously conferred upon such other Participants.

6.6 Records and Reports

The Administrator shall take any actions it deems necessary or appropriate to comply with laws and regulations relating to maintenance of records, notification to Participants, reports to the United States Department of Labor, and all other requirements applicable to the Plan.

ARTICLE 7
Claims

7.1 Claim Procedure

(a) A Participant who is determined not to be entitled to Plan benefits may file with the Administrator a signed, written application for benefits specifically identifying the benefits claimed and describing all facts and circumstances entitling the Participant to payment of benefits.

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(b) Within 90 clays after receipt of a claim for benefits, the Administrator shall notify the Participant of the Administrator's decision. If the claim is denied in whole or in part, the Administrator's notice of denial shall he in writing and shall give:

i. the specific reasons for denial with specific reference to pertinent Plan provisions upon which the denial was

based; a description of any additional materials or information necessary for the Participant to perfect the claim and an explanation of why the materials or information are necessary; and

iii. an explanation of the Plan's claim review procedure.

(c) For a period of 60 days after receiving the Administrator's notice of denial, a Participant or his or her duly authorized representative may:

i. review plan documents; and

ii. submit a written request to the administrator for review of he benefit denial

(d) A Participant submitting a request for review shall be allowed to submit issues in writing to the administrator.

(e) The Administrator shall afford any Participant so requesting a full and fair review of the decision denying the Participant's claim; and the Administrator, in its sole discretion, may hold a hearing to review any or all issues raised by the Participant. The Administrator shall issue a written decision to the Participant within 60 days after receipt of the request for review (unless special circumstances, such as the need to hold a hearing, require an extension of time, in which case a decision shall be rendered as Soon as possible but no later than 120 days after the request for review). The Administrator's decision shall give specific reasons for the decisions, written in a manner calculated to be understood by the Participant and shall include specific references to the pertinent Plan provisions upon which the decision is based.

ARTICLE 8
Miscellaneous

8.1 No Guarantee of Employment, etc.

Neither the creation of the Plan nor anything contained herein shall be construed as giving any Participant or other Employee any right to remain in the employ of the Company, any equitable or other interest in the assets, business, or affairs of the Company, or any right to challenge any action taken or policy adopted or pursued by the Company.

8.2 Controlling-Law

The terms of the Plan and the rights and duties of all parties hereto or persons affected hereby shall be construed and determined according to ERISA to the extent applicable. It is intended that the Plan shall be an employee welfare benefit plan as described in Section 3(1) of ERISA. In the event of any ambiguity in the Plan, the construction of the Pension Committee shall be within its sole discretion and shall be binding for all purposes; provided, however, that the Plan shall always be construed in compliance with applicable law.

8.3 Severability

If any provision of the Plan is held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining parts of the Plan, and the Plan shall be construed and enforced as if the illegal and invalid provision were not included.

ARTICLE 9
Amendment and/or Termination

9. 1 Right to Amend or Terminate

Johnson & Johnson, as Plan Sponsor, reserves the absolute right to amend or terminate this Plan and Summary Plan Description, at any time and in whole or in part, without prior consultation or notice to the Plan participants.

9.2 Termination or Amendment Procedure

The right to amend or terminate may be exercised by the Board of Directors of Johnson & Johnson in accordance with its normal procedures. Such right may be delegated to the Pension Committee or an officer or group of officers of Johnson & Johnson.

Upon delegation, the right to terminate or amend this Plan and Summary Plan Description may be exercised by a writing setting forth the amendment and/or termination and executed by the individual or individuals to whom this authority has been delegated.

IN WITNESS WHEREOF, The Severance Plan and Summary Plan Description of Johnson & Johnson and Affiliated Companies is executed by The Pension Committee this 8th day of September, 1992.

JOHNSON & JOHNSON

By Members of The Pension Committee

_____

_____

_____

_____

_____

RETIREMENT PLAN OF JOHNSON & JOHNSON

AND AFFILIATED COMPANIES

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RETIREMENT PLAN OF
JOHNSON & JOHNSON AND AFFILIATED COMPANIES

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ARTICLE 12
EARLY RETIREMENT INCENTIVES

Early retirement incentive programs, as adopted from time to tine by the Employer, are described in Exhibit E.

EXHIBIT A

SALARIED COVERAGE AS OF JANUARY 1, 1989
JOHNSON & JOHNSON AND AFFILIATED COMPANIES

"A"-COMPANY
CHICOPEE
CODMAN & SHURTLEFF, INC.
CRITIKON, INC.
DEVRO, INC.
ETHICON ENDO-SURGERY ETHICON, INC.
FIRST STATE CHEMICAL COMPANY
INMULOK, INC.
IMMUNOBIOLOGY RESEARCH INSTITUTE
IOLAB CORPORATION
JANSSEN PHARMACEUTICAL, INC.
JOHNSON & JOHNSON
JOHNSON & JOHNSON ADVANCED BEHAVIORAL TECHNOLOGIES
JOHNSON & JOHNSON CONSUMER PRODUCTS
JOHNSON & JOHNSON DEVELOPMENT CORPORATION
JOHNSON & JOHNSON FINANCE CORPORATION
JOHNSON & JOHNSON HOSPITAL SERVICES
JOHNSON & JOHNSON INTERNATIONAL J
JOHNSON & JOHNSON PROFESSIONAL, INC.
JOHNSON & JOHNSON SHARED SERVICES
JOHNSON & JOHNSON VISION PRODUCTS, INC.
(Formerly Vistakon, Inc.)
LIFESCAN
McNEIL PHARMACEUTICAL
McNEIL / PERSONAL PRODUCTS COMPANY
NORAMCO, INC.

ORTHO BIOTECH, INC.
ORTHO DIAGNOSTIC SYSTEMS, INC.
ORTHO PHARMACEUTICAL CORPORATION
SITE MICROSURGICAL SYSTEMS, INC.
SOMERSET LABORATOREES, INC.
SURGIKOS, INC.
THERAKOS, INC.
WINDSOR MINERALS, INC.

EXHIBIT E

EARLY RETIREMENT INCENTIVE PROGRAMS

1. Voluntary Early Retirement Enhancement Program

a. An eligible Member who elects to participate in the voluntary early retirement enhancement program ("VEREP") shall be entitled to receive the enhanced Retirement Income described in this Section.

A Member shall be eligible to participate in the VEREP if such Member

i. is a full-time Employee of an Employer listed in Chart A as of the first day of the Employer's window period

ii. satisfies the eligibility requirements of the respective Employer defined in Chart A

In order to participate in the VEREP, an eligible Member must elect to participate within the Employer's window period, and must agree to retire from the Employer on the expected retirement date or within such reasonable period thereafter as may be agreed to by the Member and the Employer. For purposes of this section, an Employee's "expected retirement date" is the first day of the second month following the end of the Employer's window period.

A Member who participates in the VEREP shall be granted an additional 3 years of Credited Service for purposes of determining the amount of Retirement Income payable under the terms of the Plan, with the maximum number of years of Credited Service increased from 40 to 43.

In addition, the age of any such Member shall also be increased by 5 years for purposes of determining any early retirement reduction factor applicable to the Member's Retirement Income, and for purposes of determining the date on which Retirement Income payments may begin.

The Covered Compensation of a Member who participates in the VEREP shall be determined through termination of employment. For VEREP participants retiring on December 1, 1993, Covered Compensation shall include any year-end cash executive bonus or holiday pay paid before January 1, 1994.

b. A Member who elects to participate in the VEREP shall also be entitled to receive a service benefit equal to two weeks' base pay times the number of full years of the Member's company service, to a maximum of 52 weeks' base pay. A Member's "company service" is the Member's period of full time employment with an Employer or with a Predecessor Company. A Member's "base pay" is such Member's rate of pay as of termination of employment.

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The service benefit shall be payable as an annuity in the same form (excluding any level income option) and at the same commencement date as the Member's Retirement Income. The amount of the annuity shall be determined by converting the total service benefit to a single life annuity using the 1971 Group Annuity Mortality Table for Males with a 3 year setback, and an interest rate of 4%. The single life annuity shall then be converted to the form of the Member's Retirement Income that is the Equivalent Actuarial Value of the life annuity. If the commencement date of the annuity is deferred, the annuity will be multiplied by a fraction, the numerator of which is the early retirement reduction factor under Section 5.02 at the benefit commencement age plus five years, and the denominator of which is the early retirement reduction factor under Section

5.02 at the Member's age as of termination of employment plus five years.

In place of an annuity, the Member may elect to receive his service benefit in monthly installments (to a maximum of 12 installments) equal to the Member's monthly base pay or such lesser amount for the final installment, commencing upon the Member's termination of employment. Such election shall not be valid unless the spouse of the Member consents to such form of payment in accordance with the provisions of Section 6.03.

c. A Member who first meets the requirements of subsection (a) of his Employer after the end of the Employer's window period but on or before February 28, 1994, may elect, within the period from December 1, 1999, through January 14, 1994, to participate in the VEREP.

d. A Member who would otherwise have met the requirements of subsection (a), but who either retired on or after age 55 or terminated employment as part of an Employer's Voluntary Separation Program before the beginning of the Employer's window period but on or after August 1, 1993 (on or after July 1, 1993 for Corporate employees), shall be entitled to receive the following additional benefits beginning on the first day of the second month following the end of the Employer's window period.

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Chart A - Employers Participating in VEREP and Eligibility Requirements

Employer	Window Period	Eligibility Requirements (see following page)
J&J Corporate	September 1, 1993 - October15, 1993	(a),(b) and (c)
McNeil Consumer Products Co.	September 16, 1993 -October 30, 1993	(a),(b),(c) and (d)
McNeil Specialty Products Co.	September 16, 1993 October 30, 1993	(a),(b) and (c)
J&J Consumer Products, Inc.	September 16, 1993 - October 30, 1993	(a),(b),(c),(d) and (s)
Personal Products Co.	September 16, 1993 - October 30, 1993	(a),(b) and (c)
J&J Advanced Materials Co.	September 16, 1993 - October 30, 1993	(a),(b),(c) and (d)
Personal Products Worldwide	September 16, 1993 - October 30, 1993	(a),(b) and (c)
J&J Worldwide Absorbent Products & Materials Research	September 16, 1993 - October 30, 1993	(a),(b),(c) and (d)
Advanced Care Products	September 16, 1993 - October 30, 1993	(a),(b),(c) and (e)
Noramco, Inc.	September 16, 1993 - October 30, 1993	(a),(b) and (c)
"A" Company	September 16, 1993 - October 30, 1993	(a),(b),(c) and
Ethicon, Inc.	October 1, 1993 - November 14, 1993	(a),(b),(c),(g) and (h)
Ortho Diagnostic Systems, Inc.	October 16, 1993 - November 29, 1993	(a),(b),(c),(j) and (k)
Ortho-McNeil Pharmaceutical, Corp.	October 16, 1993 - November 29, 1993	(a),(b),(c) and (i)
Ortho Biotech Inc.	October 16, 1993 - November 29, 1993	(a),(b),(c) and (l)

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R. W. Johnson Pharmaceutical Research Institute	October 16, 1993 - November 29, 1993	(a), (b) and (c)
J&J Health Management, Inc.	October 16, 1993 - November 29, 1993	(a), (b) and (c)
J&J Medical, Inc.	November 1, 1993 - December 15, 1993	(a), (b), (c), (m) and (r)
J&J Hospital Services, Inc.	November 1, 1993 - December 15, 1993	(a), (b), (c) and (n)
J&J Orthopedics, Inc.	November 1, 1993 - December 15, 1993	(a), (b) and (c)
Codman & Shurtleff, Inc.	November 1, 1993 - December 15, 1993	(a), (b), (c) and (d)
Therakos, Inc.	November 1, 1993 - December 15, 1993	(a), (b) and (c)
IOLAB Corp.	November 1, 1993 - December 15, 1993	(a), (b), (c), (d) and (o)
Ethicon Endo-Surgery	November 1, 1993 - December 15, 1993	(a), (b) and (c)
J&J Interventional Systems Co.	November 1, 1993 - December 15, 1993	(a), (b) and (c)
Vistakon	November 1, 1993 - December 15, 1993	(a), (b), (c) and (p)
Critikon, Inc.	December 1, 1993 - January 14, 1994	(a), (b), (c) and (d)
Janssen Pharmaceutica, Inc.	January 1, 1994 - February 14, 1994	(a), (b), (c) and (q)
Janssen Research Foundation	January 1, 1994 - February 14, 1994	(a), (b) and (c)
LifeScan, Inc.	January 1, 1994 - February 14, 1994	(a), (b) and (c)

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[end of: Chart A - Employers Participating in VEREP and Eligibility Requirements]

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APP.71

Key to Eligibility Requirements

(a) has attained age 50 and has completed 7 years of Credited Service as of the last day of the month in which the Employer's window period ends

(b) has not been granted certificates of extra compensation (CECs) which have not fully vested as of the last day of the month in which the Employer's window period ends

(c) is not on an Approved Absence for long term disability (as defined in the Employer's long term disability income plan) for at least one day during the window period of the Employer

(d) is not a production worker

(e) is not working in the research and development, clinical or regulatory divisions

(f) is not a production worker, except if working in tooling or diemaking

(g) is not a production worker in Alburquerque, NM (except for maintenance technicians) or Cornelia, GA

(h) is not an exempt associate in the sales and national accounting divisions

(i) is not a field-based employee

(j) is not working in one of the following departments (except for secretarial, managerial and planning personnel working in these departments):

i. Blood Bank Manufacturing and Quality Assurance

ii. AIDS/Hepatitis Manufacturing and Quality Assurance

iii. Hemostasis Manufacturing and Quality Assurance
iv. Immunecytometry Manufacturing and Quality Assurance
v. Central Quality Assurance
vi. Shipping/Receiving
vii. Maintenance

(k) is not working in of the following locations:
i. Carpinteria
ii. Somerset Labs – Buffalo
iii. Somerset Labs - Orange

(*l*) is not a Management Board Level employee

(m) is not working in the Advanced Sterilization Products division

(n) is not a field account management employee

(o) is not a Field Sales Employee

(p) is not a sales representative, wage employee, manager in international operations or customer service representative

(q) is not working in sales, marketing, corporate development or government affairs departments

(r) is not working in the division located in Jacksonville, FL

(s) is not a salaried production worker in Royston, GA

[end of page and Exhibit E]

FILED
MAR 20 1995
AT 8:30 ...11.....M*HS*
WILLIAM T. WALSH

ENTERED
On
THE DOCKET
CLERK on 3/21 1995
WILLIAM T. WALSH, CLERK
By ___s/s
(Deputy Clerk)

Civil Action No 94-5332 (NHP)*(*)*

HAWES
Plaintiff(s)

v.

JOHNSON & JOHNSON
Defendant(s)

PRETRIAL SCHEDULING ORDER

This matter having come before the Court for a scheduling conference pursuant to Civil Rule 16; good cause appearing;

IT IS on this 20th day of March, 1995,

ORDERED THAT:

I. DISCOVERY

1.Civil Rule 26(a)(1) disclosures shall be made not later than - ***left blank***

2.Interrogatories and document requests shall issue not later than - ***to be set.***

3.Discovery shall remain open through - ***left blank***
No discovery is to be issued or engaged in beyond that date.

4.No objections to questions posed at depositions shall be made except as permitted by Civil Rules 30(d)(1) and 32(d)(3)(A). No

instruction not to answer shall be given except as permitted by Civil Rule 30(d)(1).

5.Any discovery dispute shall be brought to the Court's attention in the first instance by letter of by telephone conference call immediately after the parties' good faith attempt to resolve the dispute has failed. General Rule 15E.2.

(*)Civil action no. 94-6203 (NHP) is hereby consolidated with this case for all purposes.

[end of page]

II. MOTION PRACTICE

6. Any motion to amend pleadings or add new parties shall comply with General Rule 12C and shall be returnable not later than *(*)*

7. Any dispositive motion shall comply with General Rule 12N. Motion papers shall be served by - ***to be set***
The parties are directed to General Rule 27B, which prescribes limits to length of briefs.

III. EXPERTS

8. Not later than - ***to be set*** the report of any proposed affirmative expert witness shall be served.

9.Not later than - ***to be set*** the report of any proposed rebuttal expert witness shall be served.

10.Each expert report shall conform with Civil Rule 26(a)(2)(B).

11. No expert shall testify at trial as to any opinions or base those opinions on facts not substantially disclosed in the expert's report.

IV. FINAL PRETRIAL CONFERENCE

12. A final pre trial conference shall be conducted pursuant

to Civil Rule 16(d) a.m./p.m. on - ***left blank*** 199

13. All counsel are directed to assemble at the office of counsel for plaintiff(s) not later than ten (10) days before the pretrial conference to prepare the Pretrial Order in the form and content required by the Court. Counsel for plaintiff(s) shall prepare the Pretrial Order and shall submit it to all other counsel for approval.

14. The original of the Pretrial Order shall be delivered to Chambers not latter than twenty-four (24) hours before the pretrial conference. All counsel are responsible for the timely submission of the Pretrial Order. All counsel are responsible for the timely submission of the Pretrial Order.

V. MISCELLANEOUS

15.The Court may from time to time schedule conferences as may be required, either sua sponte or at the request of a party.

16.Since all dates set forth herein are established with the assistance and knowledge of counsel there shall be no extensions except for good cause shown and by leave of Court.

(*) Defendants to amend answer by 4/21/95

[end of page]

17. Failure to appear at subsequent conferences or to comply with the terms of this or any other Order may result in the imposition of sanctions. Civil Rule 16(f).

18. A copy of every pleading, document or-written communication with the Court shall be served on all other, parties to the action. Any such communication which does not recite or contain a certification of such service may be disregarded by the Court.

19.There shall be a status/settlement conference on - ***5/3/95 at 11 am. (*)***

(*) 20. Defendants to identify individuals who were entitled to retirement (VEREP) benefits and subject to any reduction in force or elimination of position by 4/21/95. Defendants also to identify J&J subsidiaries, ect, that participated in VEREP. Plaintiffs may revisit scope of disclosure.

s/s

RONALD J. HEDGES
UNITED STATES MAGISTRATE JUDGE

Original: Clerk

cc: District Judge
File

[end of page]

CARPENTER, BENNETT & MORRISSEY

LAW OFFICES
THREE GATEWAY CENTER
100 MULBERRY STREET
NEWARK, NJ 07102-4079

April 21, 1995

Carol H. Sapakie, Esq.
Selikoff & Cohen, P.A.
Suite 314
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233

Re: Slaydon-Hawes v. Johnson & Johnson, et al. Muscarella v. Johnson & Johnson, et al.
Civil Action No. 94-5332 (NHP)

Dear Ms. Sapakie:

I enclose the following in accordance with Judge Hedges' March 30, 1995 order:

1. List of companies or divisions that participated in the Severance Plan and VEREP, with the dates of the VEREP window period for each.

JA204

2. The individuals in 19 of the participating companies or divisions who were eligible under VEREP and were subject to a reduction in force or position elimination. (as set forth in my April 20, 1995 letter to Judge Hedges, defendants are seeking an extension of time to obtain this information for the remaining companies).

There does not appear to be anyone in addition to the three plaintiffs and Carol Holder who elected VEREP and applied for benefits under the plan.

[end of page 1] JA204

2. Amended answers to the Hawes and Muscarella complaints on behalf of the corporate defendants, plan and Pension Committee.

Very truly yours,

CARPENTER, BENNETT MORRISSEY

s/s Francis X. Dee

Francis X. Dee

FXD:232: ls
Enclosures

[end of page 2 end of letter] JA205

1. Companies or divisions that participated in the Severance Plan and VEREP

Company or Division	VEREP Window Period
J&J Corporate	9/1/93 - 10/15/93
McNeil Consumer Products Company	9/16/93 - 10/30/93
McNeil Specialty Products Company	9/16/93 - 10/30/93
J&J Consumer Products, Inc.	9/16/93 - 10/30/93
Personal Products Co.	9/16/93 - 10/30/93
J&J Advanced Materials Co.	9/16/93 - 10/30/93

Personal Products Worldwide	9/16/93 - 10/30/93
J&J Worldwide Absorbent Products & Materials Research	9/16/93 - 10/30/93
Advanced Care Products	9/16/93 - 10/30/93
Noramco, Inc.	9/16/93 - 10/30/93
"A" Company (sold 1994)	9/16/93 - 10/30/93
Ethicon, Inc.	10/1/93 - 11/14/93
Ortho Diagnostic Systems, Inc.	10/16/93 - 11/29/93
Ortho McNeil Pharmaceuticals, Inc.	10/16/93 - 11/29/93
Ortho Biotech	10/16/93 - 11/29/93
R. W. Johnson Pharmaceutical Research Institute	10/16/93 - 11/29/93
J&J Health Management, Inc.	10/16/93 - 11/29/93
J&J Medical, Inc.	11/1/93 - 12/15/93
J&J Hospital Services, Inc.	11/1/93 - 12/15/93
J&J Orthopaedics, Inc.	11/1/93 - 12/15/93
Codman & Shurtleff, Inc.	11/1/93 - 12/15/93
Therakos, Inc.	11/1/93 - 12/15/93
IOLAB (sold 1995)	11/1/93 - 12/15/93

[end of page]

Ethicon Endo-Surgery	11/1/93 - 12/15/93
J&J Interventional Systems Co.	11/1/93 - 12/15/93
Vistakon	11/1/93 - 12/15/93
Critikon, Inc.	12/1/93 - 1/14/94
Janssen Pharmaceutica, Inc.	1/1/94 - 3/14/94
Janssen Research Foundation	1/1/94 - 3/14/94
LifeScan, Inc.	1/1/94 - 3/14/94

I. Individuals entitled to VEREP benefits and subject reduction-in-force or elimination of position

Company or Division	Employees
Advanced Care Products	None
McNeil Specialty Co.	None
McNeil Consumer Products Co.	George Amos
	Marion Amos

	Robert Braun
	Helen Durlacher
	Julius Gross
	Virginia Kokinda
	Carl Kokinda
	John Poole
	Eva Robinson,
	Madeline Santoro
	Antoinette Trofa
	John Wasilewski
	Barbara Rossbauer
	D. Sperry
Janssen Pharmaceutica, Inc.	None
Janssen Research Foundation, Inc.	None
Lifescan, Inc.	None
Ortho Biotech	None
Ortho Diagnostic Systems, Inc.	None
J&J Orthopaedics, Inc.	
Codman & Shurtleff, Inc.	Betty Gazziano
J&J Hospital Services	None

[end of page] **JA207**

J&J Health Management, Inc.	None
J&J Interventional Systems	None
J&J Medical, Inc.	None
Therakos, Inc.	None
J&J Corporate	None
Ethicon, Inc.	T. Carroll
	E. Boisier
	W. Stack
	D. Considine
	J. Sladek
	B. Noll
	D. Harvill
	C. Kindt
	A. Noll
	E. Birkett
	P. Guerrera

	B. Hillhouse
	F. Ferris ,
Noramco, Inc.	None
Vistakon, Inc.	None

[end of page end of enclosures]

JA208

CARPENTER, BENNETT & MORRISSEY

LAW OFFICES
THREE GATEWAY CENTER
100 MULBERRY STREET
NEWARK, NJ 07102-4097

May 12, 1995

Carol H. Sapakie, Esq.
Selikoff & Cohen, P.A.
Suite 314
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233

Re: Slaydon-Hawes v. Johnson & Johnson, et al. Muscarella v. Johnson & Johnson, et al.
Civil Action No. 94-5332 (NHP)

Dear Ms. Sapakie:

The following supplements part II of the information provided on April 21, 1995 in accordance with Judge Hedges' March 20, 1995 order..

II.. Individuals entitled to VEREP benefits and subject to reduction-in-force, or elimination of position

Company or Division	Employees
Ethicon Endo-Surgery	S. Failla
	E. Mills
	C. Rahe
	J. Pynn
	T. Dehart
	A. Harmon
	E. Burrington
	R. Rothfuss
	L. Main

EXHIBIT D JA209

[end of page]

Ortho-McNeil Pharmaceutical	S. Kieruif
	B. Page
	K. Patel
	B. Rodriguez
Direct Access Diagnostics	None
Critikon, Inc.	None
J&J Consumer Products, Inc.	None

J&J Advanced Materials Company	None
Personal Products Company	Carol Holder
J&J World Wide Absorbent Products	None
Materials Research	
RW Johnson Pharmaceutical	None
Research Institute	
IOLAB	None

Very truly yours,

CARPENTER, BENNETT & MORRISSEY

s/s Francis X. Dee

Francis X. Dee

FXD:232:en

[end of page] **JA210**

SEVERANCE GUIDELINES PPC ENGINEERING (MILLTOWN PLANT CLOSURE)

1. NOTICE: SALARY AND BENEFITS CONTINUED THROUGH OCTOBER 29, 1993 OR UNTIL THE INDIVIDUAL OBTAINS OTHER EMPLOYMENT, WHICHEVER OCCURES FIRST.

2. SEVERANCE PAY:

MAXIMUM ALLOWANCE PER YEAR OF SERVICE*

YEARS OF COMPLETED SERVICE	NON-EXEMPT	EXEMPTS NON-BONUS ELIGIBLE	EXECUTIVE BONUS ELIGIBLE
UNDER 7 YEARS	1 WEEK**	1 WEEK	2 WEEKS
7 THROUGH 11 YEARS	1 ½ WEEKS	2 WEEKS	3 WEEKS
12 THROUGH 19 YEARS	1 ½ WEEKS	2 ½ WEEKS	1 MONTH
20 YEARS AND OVER	1 ¾ WEEKS	3 WEEKS	1 MONTH

* MINIMUM OF 8 WEEKS AND A MAXIMUM OF 18 MONTHS SEPARATION PAY.
** CURRENT POLICY 2 WEEKS PER YEAR OF SERVICE ALL CATEGORIES

3. BENEFITS: UPON TERMINATION, EMPLOYEES WILL BE PROVIDED THE OPPORTUNITY TO EXTEND MEDICAL BENEFITS (EXCLUDING DENTAL) AND LIFE INSURANCE COVERAGE THROUGH THE DURATION OF SEPARATION PAYMENTS, OR UNTIL THE INDIVIDUAL HAS INSURANCE COVERAGE WITH A NEW EMPLOYER, WHICHEVER OCCURS FIRST. DENTAL COVERAGE MAY BE, CONTINUED FOR A PERIOD UP TO 18 MONTHS FROM THE DATE OF SEPARATION UNDER COBRA REGULATIONS. UPON EXPIRATION OF SEPARATION PAY, EMPLOYEES WILL BE PROVIDED THE OPPORTUNITY TO CONVERT LIFE INSURANCE; MEDICAL BENEFITS ALSO CAN BE CONTINUED UNDER COBRA FOR A TOTAL OF 18 MONTHS PROM THE DATE OF SEPARATION, INCLUDING THE SEVERANCE PAY PERIOD.

4. CAREER CENTER: ORIENTATION MEETING IS SCHEDULED FOR SEPTEMBER 2 FROM 9AM – 5PM.

8/11/93 PRESENT: R. JENKINS
R. RAPIEJIKO
R. MUSCARELLA

RECEIVED
s/s
R. MUSCARELLA, 8/20/93 1:15 PM APPRO.

EXHIBIT A

Personal Products

MILLTOWN, NEW JERSEY (908) 524-0400

TO: Robert Muscarella October 25, 1993

FROM: R. J. Rapiejko s/s RJR

SUBJECT: VEREP

As requested, this confirms, our conversation regarding VEREP. If you take VEREP you are not eligible for the separation package as outlined at the meeting of August 20, 1993. It is your choice, you are eligible for the separation package or VEREP, not both.

RECEIVED
10/25/93
s/s
R. MUSCARELLA

EXHIBIT D 000080 **JA189**

SELIKOFF & COHEN, P.A.
307 Fellowship Road,
Suite 314
Mt. Laurel, New Jersey
08059 (609) 778-6055
CS 0100
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 94-5332(NHP)

Civil Action

SECOND AFFIDAVIT OF ROBERT MUSCARELLA

SANDRA SLAYDON HAWES et al.,
Plaintiffs on behalf
themselves and classes
of similarly situated
persons,

V.

JOHNSON & JOHNSON, a New Jersey
corporation; et al.,
Defendants.

STATE OF NEW JERSEY)
) ss:
COUNTY OF BURLINGTON)

ROBERT A. MUSCARELLA, being of full age and duly sworn according to law, upon my oath depose and say that:

1. I am a Plaintiff in the above-captioned action and reside at 90 Jamie Court, Town of Monmouth Junction, Middlesex County, New Jersey 08852.

2. On October 19, 1993 I received that portion of Personal Products' Personnel Practice manual attached hereto as Exhibit E which informed me that retirees were not eligible for severance unless they retired "as part of a company- sponsored voluntary workforce reduction program."

[end of page] **JA381**

3. On September 11, 1993, I received a package of materials describing VEREP. It included the letter from Efrem B. Dlugacz, Johnson & Johnson's Director of Corporate Benefits attached hereto as Exhibit F. The execution page for the Retirement Plan of Johnson & Johnson attached as Exhibit I to this affidavit, informs me that Mr. Dlugacz is a member of the Johnson & Johnson Pension Committee.

4. Mr. Dlugacz's letter attached hereto as Exhibit F informed me that " You are eligible for the special Voluntary Early Retirement Enhancement Program that was recently announced", and that I would "receive a special Service Benefit from the Pension Plan ...." (emphasis supplied) if I accepted an early retirement pursuant to VEREP.

5. The VEREP package which I received under cover of Mr. Dlugacz's letter on September 11, 1995, also included a nineteen page document entitled "Johnson & Johnson Voluntary Early Retirement Enhancement Program (VEREP) Questions and Answers" attached hereto as Exhibit G. The following question and answer informed me that the VEREP service benefit was part of my pension benefit:

> Q26. IS THE SERVICE BENEFIT PART OF MY PENSION BENEFIT?
>
> A26. The Service Benefit is paid from the Pension Plan and is in addition to your enhanced pension benefit under the VEREP.

6. The following question and answer from the same document informed me that the VEREP service benefit would be Characterized for tax purposes as a pension distribution rather than as severance or a continuation of wages:

> Q24. WHAT ARE THE TAX CONSIDERATIONS FOR THE SERVICE BENEFIT?

A24. If you receive the Service Benefit as an annuity payment added to your enhanced monthly pension benefit, it will be subject to the same federal income taxes, and possibly state and local taxes, in the year received similar to your pension. Amounts paid from the pension Plan are not subject to Social Security (FICA) taxes.

If you receive the Service Benefit in monthly installment for up to one year, based on your service, it is subject to federal income taxes and possibly state and local taxes. In addition, if you are under age 55; in the year of retirement, the Service Benefit may be subject to an additional 10% early distribution tax. If you want to defer taxes (and defer or eliminate the additional 10% early distribution tax), the monthly installments can be rolled over to an IRA.

7. In response to my request for an ERISA plan document describing VEREP, the J&J Corporate Benefits Department informed me by unsigned letter dated November 12, 1993 attached hereto as Exhibit H that the VEREP program offered enhancements to the current Johnson & Johnson pension plan, that the enhancements "are part of the J&J Salaried Pension Plan", that the pension plan enhancements included the "service benefit", and that a separate plan document "is not required".

8. None of the material I received from Johnson & Johnson concerning its VEREP program ever told me that if I accepted VEREP generally or the VEREP service benefit in particular that I would not be eligible for severance under the Johnson & Johnson Severance Plan. Nor was I ever informed that my severance benefits were being off set by the VEREP service benefit.

9. My attempts to obtain a plan description for VEREP was unsuccessful until on June 15, 1995 the United States Internal Revenue Service sent me the Retirement Plan of Johnson & Johnson

and Affiliated Companies attached hereto as Exhibit I. I found that VEREP, including its service benefit, was incorporated into the Johnson & Johnson Retirement Plan through Article 12 and Exhibit E thereto.

10. I am informed by the execution page attached to the Johnson & Johnson's Retirement Plan attached hereto as Exhibit I that the members of the "Pension Committee of the Board of Directors" includes Chairman, Clark H. Johnson, Efrem B. Dlugacz, Joanne Heisen, Roger S. Fine, and Robert E. Campbell. Johnson & Johnson's Frank Bolden corporate counsel is not a member of the Pension Committee.

11. I am informed by pages 50 and 51 of the Johnson & Johnson 1993 Annual Report, attached hereto as Exhibit J, that Pension Committee Chairman Clark H. Johnson was at that time a vice president and chief financial officer of Johnson & Johnson and a member of its Board of Directors as well as its Executive Committee.

12. I am informed by the letter attached hereto as Exhibit F that Pension Committee member Efrem B. Dlugacz was at that time Johnson & Johnson's Director of Corporate Benefits.

13. I am informed by pages 50 and 51 of the Johnson & Johnson 1993 Annual Report, attached hereto as Exhibit J, that Pension Committee member Joanne Heisen was at that time Johnson & Johnson's Corporate Treasurer.

14.I am informed by pages 50 and 51 of the Johnson & Johnson 1993 Annual Report, attached hereto as Exhibit J, that

[end of page 4] **JA384**

Pension Committee member Roger S. Fine was at that time Johnson & Johnson's Vice President for Administration and member of the Johnson & Johnson Executive Committee.

15.1 am informed by pages 50 and 51 of the Johnson & Johnson 1993 Annual Report, attached hereto as Exhibit J, that Pension Committee member Robert E. Campbell was at that time Vice Chairman of Johnson & Johnson's Board of Directors.

16. To the best of my knowledge, Robert Rapiejko was at all times relevant not a member of the Johnson & Johnson Pension Committee or of the Johnson & Johnson General Counsel's Office.

s/s

ROBERT A. MUSCARELLA

SWORN and SUBSCRIBED to
before me this 10th day
of August, 1995

s/s Joan E. Peculski

NOTARY PUBLIC

JOAN E PECULSKI
Notary Public of New Jersey
My Commission Expires 10/20/97
ID # 54888

[end of page 5]

JOHNSON & JOHNSON

RECIEVED
9/11/93
s/s

R. Muscarella

September 10, 1993

Dear Employee:

You are eligible for the special Voluntary Early Retirement Enhancement Program (VEREP for short) that was recently announced.

The VEREP offers a unique opportunity to retire voluntarily from Johnson & Johnson with enhanced benefits. If you elect to retire under this program, your benefits will be enhanced as follows:

* Five years will be added to your age and three years will be added to your Pension Credited Service to increase your pension benefit. As a result, even if your actual age is under 55, you will become immediately eligible to begin receiving pension payments.

* You will receive a special Service Benefit from the Pension Plan equal to two weeks of regular base pay multiplied by your actual completed years of employment service with Johnson & Johnson. This Service Benefit provides a maximum benefit equal to 52 weeks of regular base pay and is in addition to the enhancement to your regular pension benefit described above.

* You will immediately be made eligible for Retiree Medical and Retiree Life Insurance Benefits if your current age and Credited Service do not already entitle you to these benefits.

* If you are an executive who has been awarded Stock Options, your outstanding options will immediately become

100 % vested, and the exercise period win be extended in accordance with the Plan rules.

We have developed a number of initiatives to help you reach a decision in this very important matter. Enclosed is personalized information to help you consider the value of this program. In addition, we have provided Questions and Answers which cover many issues we expect you will want to know about. You are also invited to attend a seminar to help You understand the financial impact of retirement under the VEREP (see enclosed invitation). An 800-hotline is available for your ongoing questions. The hotline number is 1-800-235-3426.

[end of page] 000187 **JA387**

In order to retire under this special program, you must sign and return the "Retirement Election Form" in this package. it must be postmarked no later than Saturday, October 30, 1993. Your retirement date will then be December 1, 1993, but may be extended by Johnson & Johnson until as late as February 1, 1994.

Since the VEREP is strictly voluntary, the choice to retire or not should be a knowledgeable, informed one based on factors that apply to you and your family. I urge you to review carefully all of the materials in this package, to attend a seminar and to call the hotline with your questions.

Sincerely,

s/s
Efrem B. Dlugacz
Corporate Director of Benefits

[end of page] 000188 **JA388**

EXHIBIT F

JOHNSON & JOHNSON

November 12, 1993

410 GEORGE STREET
NEW BRUNSWICK, N.J. 08901

Mr. Robert A. Muscarella
90 Jamie Court
Monmouth Junction, N.J. 08852

Re: VEREP FULL DISCLOSURE

Dear Mr. Muscarella:

Johnson & Johnson Corporate Benefits has received your letter requesting a copy of the full disclosure for the VEREP Program.

The VEREP Program represents enhancements to the existing J&J Salaried Pension Plan. The enhancements include an additional 5 years of age and 3 years of Credited Service to your pension benefit and the addition of the new Service Benefit.

Since these enhancements are part of the J&J Salaried Pension Plan, we are drafting an amendment to the current Pension Plan document to reflect these Plan changes. A separate Plan Document is not required. The amendment will be completed within the next couple of months. You may request a copy of the amendment through your local Benefits Department in early 1994.

Sincerely,

J&J Corporate Benefits

EXHIBIT H 000173 **JA408**

CERTIFICATION OF PENSION PLAN AMENDMENT
AND RESTATEMENT

Effective January 1, 1989, (except as otherwise provided herein) the Retirement Plan of Johnson & Johnson and Affiliated Companies is amended and restated in its entirety. The Plan, as constituted immediately prior to the execution of this amendment and restatement, is replaced by the attached Plan document.

Date: 12/15/94

PENSION COMMITTEE OF
THE BOARD OF DIRECTORS

Name: s/s
C. H. JOHNSON
Title: (CHAIRMAN)

Name: s/s
R. E. CAMPBELL
Title: (MEMBER)

Name: s/s
E. B. DLUGACZ
Title: (MEMBER)

Name s/s
R. S. FINE
Title: (MEMBER)

Name: s/s
J. H. HEISEN
Title: (MEMBER)

EXHIBIT I **JA409**

Court, U.S.
FILED
(4)
991850 MAY 15 2000
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
pro se, on behalf of themselves and class of similarly situated persons,

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME III APP. 96-144

Sandra Slaydon Hawes
23 Madeline Court
Helmetta, NJ 08828
(732) 521-0351

Robert A. Muscarella
90 Jamie Court
Monmouth Junction, NJ 08852
(732) 274-2060

Vanita Kadam
Estate of Manohar B. Kadam
14 Stout Court
East Brunswick, NJ 08816
(732) 254-1596

Carolyn Holder
Apt.#952A Village Drive
North Brunswick, NJ 08902
(732) 846-3629

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(attached to the Affidavit of Joann Heffernan Heisen, as Exhibit A)

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(Signature page, CERTIFICATION OF PENSION PLAN AMENDEMENT AND RESTATEMENT)

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(Note: Exhibit A, J&J Severance Plan, attached thereto at App.48-58)

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29USC §621 (a) ---------- 130-131
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[1] May it please the Court, by information provided by the Clerk of Court, Petitioners are informed, the RULES of the Supreme Court of the United States, adopted January 11, 1999, effective May 3, 1999, do not prohibit inclusion of a TRANSCRIP which has not been certified.

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Carpenter, Bennett & Morrissey (FD7739)
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4082
Telephone: 201-622-7711

Attorneys for Defendants

FILED
SEP 8 1995
a t 8:30.....M
WILLIAM T. WALSH
CLERK

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA and MANOHAR B. KADAM

Plaintiffs on behalf of themselves and classes of similarly situated persons,

v.

JOHNSON & JOHNSON, et al.,

Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

DOCKET NO.: 94-5332 (NHP)

CIVIL ACTION

AFFIDAVIT OF JOANN HEFFERNAN HEISEN

Joann Heffernan Heisen, of full age and being sworn according to law, upon her oath hereby deposes and says:

1. I am currently a member of the Pension Committee of Johnson & Johnson and was a member of the Pension Committee during the period in which the applications of the three Plaintiffs for benefits under the Severance Plan and Summary Plan Description of Johnson & Johnson and affiliated companies ("Severance Plan") were made and considered. In that capacity I am familiar with the matters recited herein. A copy of the Severance Plan is attached hereto as Exhibit A.

[end of page]

2. Articles 2.1, 4.1, 4.3, 5. 1 (d), 6.3 and 6.4 of the Severance Plan designate the Pension Committee as the administrator of the Severance Plan and confer on the Pension Committee the discretion, inter alia, to construe and interpret the terms of the Severance Plan and to determine benefit eligibility -- including the authority to impose criteria for benefit eligibility in addition to those expressly stated in the Severance Plan and to deny benefits for reasons in addition to those expressly stated in the Severance Plan.

3. Article 6.4(g) of the Severance Plan expressly provides that the Pension Committee may delegate its authority under the Severance Plan, including its discretionary authority to construe and interpret the Severance Plan as well as decide any questions concerning benefit eligibility.

4. Plaintiffs' applications for benefits under the Severance Plan were denied based upon the determination that such benefits were not available to persons who had elected to receive and were receiving the substantial benefits and benefit enhancements provided under the Voluntary Early Retirement Enhancement Program ("VEREP"). This determination was made by members of the Pension Committee with the advice of Johnson & Johnson's Office of General Counsel acting as counsel to the Pension Committee.

5. Plaintiff Robert Muscarella was informed of the decision denying his application for Severance Plan benefits by letter dated March 4, 1994 from Frank Bolden, Esquire, Vice

[end of page]

President Corporate Staff and acting counsel to the Pension Committee. A copy of that letter is attached is Exhibit E to the Affidavit of Robert Rapiejko dated June 29, 1995. Plaintiffs Sandra

Slaydon Hawes and Manohar Kadam were informed of the decision to deny their applications by letter dated April 18, 1994 from Donna M. Malin, Esquire, Office of General Counsel and acting on behalf of the Pension Committee. A copy of the letters are attached as Exhibits D and F to Mr. Rapiejko's Affidavit.

6. The letters denying Plaintiffs' benefit applications were sent on behalf of the Pension Committee pursuant to the delegation of authority to the Office of General Counsel and reflected the determination and decisions of members of the Pension Committee. Further, the letters were sent with the knowledge and approval of members of the Pension Committee. I personally reviewed and approved the letters denying Ms. Hawes' and Mr. Kadam's benefit applications before they were sent. The contents of the letters denying Plaintiffs' applications for benefits was also reviewed by Efrem Dlugacz, another member of the Pension Committee, with primary responsibility for VEREP.

7. The determination not to allow Severance Plan benefits to persons who had elected and received VEREP's enhanced benefits was based upon the provisions of the Severance Plan allowing the Pension Committee to impose eligibility requirements and disqualification's in addition to those set forth in the Severance Plan and to reduce benefits even for eligible employees by the amounts of other benefit such as other severance or similar payments. This construction

[end of page]

and application of the Severance Plan, in turn, was based upon a consideration of the purpose of the Severance Plan. It was determined that the purpose of Severance Plan benefits, to provide interim income to a terminated employee while he/she was in transition, was, to the extent it was applicable to an individual retiring under VEREP, fulfilled by VEREP's enhanced benefits. These included VEREP's Service Benefit, which was calculated on the same basis and at the same level as Severance Plan benefits and

which, at the employee's election, was payable periodically over the same time period as were Severance Plan benefits.

8. The aforesaid determination and the consequent denials of Plaintiffs' applications for Severance Plan benefits, were not based upon the financial interests of either Johnson & Johnson or of Plaintiffs' employer, McNeil-PPC, Inc. (formerly known as Personal Products Company), the company from whose funds any such benefits would have been paid.

Dated: August 31, 1995 By: s/s Joann Heffernan Heisen

Joann Heffernan Heisen

Sworn and subscribed to
Before me this 31st day
Of August, 1995
s/s Caryn Emoch
Notary Pubic

Caryn A. Emoch
A Notary Pubic of New Jersey
My Commission expires Sept. 23, 1996

[end of page]

Carpenter, Bennett & Morrissey (FD7739)
Three Gateway Center
100 Mulberry Street
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Telephone: 201-622-7711

Attorneys for Defendants

FILED
MAR 26 1996
a t 8:30.....M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA
MANOHAR B. KADAM
Plaintiffs,
vs.
JOHNSON & JOHNSON, et al
Defendants.

Civil Action No.: 94-5332 (NHP)

CAROLYN HOLDER
Plaintiff,
vs.
JOHNSON & JOHNSON, et al
Defendants.

Civil Action No. 95-4351

SUPPLEMENTAL AFFIDAVIT OF
JO ANN HEFFERNAN HEISEN

Jo Ann Heffernan Heisen, of full age and being duly sworn according to law, upon her oath hereby deposes and says:

1. I am currently a member of the Pension Committee of Johnson & Johnson and was a member of that committee when the

[end of page 1]

application of Carolyn Holder for benefits under the Severance Plan and Summary Plan Description of Johnson & Johnson and Affiliated Companies ("Severance Plan") was made and considered. In that capacity, I am familiar with the matters recited herein. A copy of the Severance Plan is attached as Exhibit A to my affidavit dated

August 31, 1995. I incorporate the statements that were made in that affidavit.

2. Ms. Holder applied for benefits under the Severance Plan by letter dated March 31, 1994. Her application was denied based upon the same determination on which the applications of Sandra Slaydon Hawes, Robert A. Muscarella, and Manohar B. Kadam were denied.

3. Ms. Holder was informed of the decision denying her application for Severance Plan benefits by letter dated April18, 1994, from Donna M. Malin, Esq., Office of General Counsel, acting on behalf of the Pension Committee. The letter was sent on behalf of the Pension Committee pursuant to the delegation of authority to the Office of General Counsel, reflected the determination and decision of the Pension Committee, and was sent with the knowledge and approval of Pension Committee members. I personally reviewed and approved the letter before it was sent. A copy of that letter is attached as Exhibit A to this affidavit.

s/s Jo Ann Heffernan Heisen

Jo Ann Heffernan Heisen

Sworn and subscribed to
Before me this 9th day
of February, 1996
s/s Caryn Emoch
Notary Pubic

Caryn A. Emoch
A Notary Pubic of New Jersey
My Commission expires Sept. 23, 1996

[end of page 2]

JOHNSON & JOHNSON

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N.J. 08933-7002

(908) 524-2465

April 18, 1994

Ms. Carol Holder
952A Village Drive West
North Brunswick, New Jersey 08902

Dear Ms. Holder:

I am writing in response to your letter to the Johnson & Johnson Pension Committee dated March 28th, 1994 and received on March 30th, 1994 requesting benefits under the Johnson & Johnson Severance Plan. This request is denied.

The purpose of the Johnson & Johnson Severance Plan is to "financially assist eligible employees when they are attempting to locate a new employment position." Therefore, when the elimination of your position was announced in October of 1993, you were informed that you were eligible for benefits under the Severance Plan.

In September of 1993 you were informed that you were eligible to participate in the Voluntary Early Retirement Enhancement Program ("VEREP"). Our records indicate that you could not participate in both the Severance Plan and VEREP. My understanding is that you chose to participate in the VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. Under Section 5-1(d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any.....similar payment to

which the participant is or shall be entitled by reason of any .....other plan to which the Company directly.... contributes..."

The Personal Products Company ("PPC") policy guidelines cited in your letter are merely a summary of some of the provisions of the Severance Plan. The Severance Plan as well as the PPC guidelines both state that the Severance Plan document governs all differences.

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Therefore, your request for benefits under the Severance Plan have been denied.

Very truly yours,

s/s
Donna M. Malin

DMM/cae

JOHNSON & JOHNSON

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N. J. 08933-7002

(908) 524-2465

April 18, 1994

Ms. Sandra Hawes
23 Madeline Court
Helmetta, New Jersey 08828

Dear Ms. Hawes:

I am writing in response to your letter to the Johnson & Johnson pension Committee dated March 28th, 1994 and received on March 30th, 1994 requesting benefits under the Johnson a Johnson Severance Plan. This request is denied.

The purpose of the Johnson & Johnson Severance Plan is to "financially assist eligible employees when they are attempting to locate a new employment position." Therefore, when the elimination of your position was announced in October of 1993, you were informed that you were eligible for benefits under the Severance Plan.

In September of 1993 you were informed that you were eligible to participate in the Voluntary Early Retirement Enhancement Program ("VEREP").You were later informed that you could not participate in both the Severance Plan and VEREP. Our records indicate that you chose to participate in the VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. under Section 5.1(d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any ... similar payment to which the participant is or shall be entitled by reason of any ... other plan to which the Company directly ... contributes ..."

The Personal Products Company ("PPC") policy guidelines cited in your letter are merely a summary of some of the provisions of the Severance Plan. The Severance Plan as well as the PPC policy guidelines both state that the Severance Plan document governs all differences.

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Therefore, your request for benefits under the Severance Plan have been denied.

Very truly yours,

DHK/cae

s/s

Donna M. Malin

[end of letter] **JA372**

JOHNSON & JOHNSON

FRANK A. BOLDEN
VICE PRESIDENT
CORPORATE STAFF

NEW BRUNSWICK, N. J.

March 4, 1994

Ms. Carol H. Sapakie
Selikoff & Cohen, P.A.
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233

RE: **ROBERT H. MUSCARELLA SEVERANCE CLAIM**

Dear Ms. Sapakie:

In response to your letter to the Pension Committee of Johnson & Johnson, dated December 2, 1993 and received December 7, 1993, requesting benefits for Mr. Robert A. Muscarella under the Johnson & Johnson Severance Plan, the request is denied.

The purpose of the Johnson & Johnson Severance Plan "is to financially assist eligible employees when they are attempting to locate a new employment position". Therefore, when the elimination of Mr. Muscarella's position was announced in August of 1993, he was Informed that he was eligible for severance benefits under the plan.

In September of 1993, Mr. Muscarella was informed that he was eligible to participate In the Voluntary Early Retirement Enhancement (VEREP). He was later informed that he could not participate in both the Severance Plan and VEREP. He chose to participate In VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. Under Section 5.1 (d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any .....similar payment to which the participant is or shall be entitled by reason of any other plan to which the Company directly...contributes... "

The Personal Products Policy Guidelines cited in your letter is merely a summary of some provisions of the Severance Plan. The Severance Plan as well as the Personal Products Policy Guidelines both state that the Plan document governs all differences.

[end of page 1] **JA373**

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Mr. Muscarella's request for benefits under the Severance Plan have therefore been denied.

Sincerely,

s/s

Frank A. Bolden

FAB:jmr
bcc:
S. Bobier
J. Bulvid
D. Dlugacz

[end of letter] **JA374**

JOHNSON & JOHNSON

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N. J. 08933-7002

(908) 524-2465

April 19, 1994

Mr. Manohar Kadam
5 Van Arsdale Court
East Brunswick, New Jersey 08816

Dear Mr. Kadam:

I am writing in response to your letter to the Johnson & Johnson pension Committee dated March 28th, 1994 and received on March 30th, 1994 requesting benefits under the Johnson a Johnson Severance Plan. This request is denied.

The purpose of the Johnson & Johnson Severance Plan is to "financially assist eligible employees when they are attempting to locate a new employment position." Therefore, when the elimination

of your position was announced in October of 1993, you were informed that you were eligible for benefits under the Severance Plan.

In September of 1993 you were informed that you were eligible to participate in the Voluntary Early Retirement Enhancement Program ("VEREP").You were later informed that you could not participate in both the Severance Plan and VEREP. Our records indicate that you chose to participate in the VEREP.

Under both the Severance Plan and VEREP, the Pension Committee has the sole discretion for determining who is eligible for benefits. under Section 5.1(d) of the Severance Plan, "the Pension Committee may authorize a reduction in the severance pay to a participant by the amount of any ... similar payment to which the participant is or shall be entitled by reason of any ... other plan to which the Company directly ... contributes ..."

The Personal Products Company ("PPC") policy guidelines cited in your letter are merely a summary of some of the provisions of the Severance Plan. The Severance Plan as well as the PPC policy guidelines both state that the Severance Plan document governs all differences.

The decision has been made to not permit participation by an employee in both the Severance Plan and VEREP. Therefore, your request for benefits under the Severance Plan have been denied.

Very truly yours,

DHK/cae

s/s

Donna M. Malin

JA376

SELIKOFF & COHEN, P.A.
307 Fellowship Road,
Suite 314
Mt. Laurel, New Jersey
08059 (609) 778-6055
CS 0100
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 94-5332(NHP)

Civil Action

AFFIDAVIT OF ROBERT MUSCARELLA

SANDRA SLAYDON HAWES et al.,
Plaintiffs on behalf themselves and classes of similarly situated persons,

V.

JOHNSON & JOHNSON, a New Jersey corporation; et al.,
Defendants.

STATE OF NEW JERSEY)
) ss:
COUNTY OF BURLINGTON)

ROBERT A. MUSCARELLA, being of full age and duly sworn according to law, upon my oath depose and say that:

1. I am a Plaintiff in the above-captioned action and reside at 90 Jamie Court, Town of Monmouth Junction, Middlesex County, New Jersey 08852.

2. I was born on July 21, 1942.

3. 1 was hired as an engineer by a subsidiary of Johnson & Johnson commencing on April 24, 1967, and remained employed by Johnson & Johnson subsidiaries until November 30, 1993.

4. I was last employed as an engineer by McNeil- PPC, a Johnson & Johnson subsidiary also known as Personal Products Company ("PPC"), in Milltown, New Jersey. My position in PPC's Engineering Department was eliminated on October 29, 1993 when

the department was shut down, and I was assigned to out-placement for the month of November.

5. My active employment with Johnson & Johnson or its subsidiaries terminated on November 30, 1993, at which time I was 51 years of age.

6. On the morning of August 20, 1993, I attended a general meeting of PPC Engineering Department personnel. PPC Vice President Edward Perkins informed the meeting that the Engineering Department would be eliminated and shut down by the end of October. He indicated that those employees who were not transferred to Johnson & Johnson Worldwide Absorbent Products & Materials Research ("J&J WAPMR"), a related engineering division at the same Milltown plant, would be severed, and that approximately half of those in attendance would not be transferred. A severance benefit schedule in the form attached hereto as Exhibit A was shown on an overhead projector to all who attended the meeting.

7. That same afternoon, I was called to a private meeting with PPC Human Resources Director Robert J. Rapiejko and Director of Engineering Robert A. Jenkins. I was informed by Mr. Jenkins that there was no position for me at J&J WAPMR.

8. Mr. Rapiejko gave me a copy of the severance guidelines which had been shown on the overhead projector that morning.

9. I later received personalized separation package, attached hereto as Exhibit B, based upon the guidelines given to me on August 20, 1993. It included severance of $101,699.91 at my biweekly rate of $2,607.69 for 78 weeks starting on October 30, 1993, and continuing until April 28, 1995, or until I became reemployed by Johnson & Johnson or one of its affiliated companies.

10. On September 1, 1993, PPC announced that it was making Johnson & Johnson's Voluntary Early Retirement Enhancement Program ("VEREP") available to salaried personnel employed

on September 16, 1993. A PPC employee retiring under the VEREP program had to retire by the end of November 1993, unless requested to stay on until a later date.

11. VEREP increased the retirement benefit immediately available to employees who were 50 years of age or older and had at least seven years of service by adding five years to their age and three years to their service credit in computing a pension under Johnson and Johnson's normal retirement benefit formula.

12. VEREP was not restricted to employees being terminated, or presented to me as an alternative to severance. Because I met the age and service requirements for the VEREP program, had not been offered a transfer to another Johnson & Johnson company and could not save my job by refusing the offer of enhanced benefits, I executed the documents required to accept VEREP on September 22, 1993.

13. Because my position was scheduled for elimination when PPC's Engineering Department was shut down at the end of October, and because I was being involuntarily terminated, I inquired about my severance eligibility.

14. On October 21, 1993 I was provided a copy of the Johnson & Johnson Severance Plan attached hereto as Exhibit C and found that it included among those eligible for severance any regular full-time salaried employee "whose employment is terminated as a result of an event listed in Article 4.1(a) and who elects to retire under a retirement plan of the Company . . ..." The listed events included position elimination or a reduction in force.

15. On October 22, 1993, I discussed severance with PPC Human Resources Director Robert Rapiejko. Three days later he sent me the memo attached hereto as Exhibit D telling me that I would not be eligible for the separation package outlined on August 20, 1993 if I took VEREP. Mr. Rapiejko did not mention severance under the Johnson & Johnson Severance Plan.

16. On December 2, 1993, an attorney on my behalf submitted an application for severance benefits to the Johnson & Johnson Severance Plan administrator.

17. In March 1994, I received correspondence dated March 4, 1994, from Johnson & Johnson's Vice President and General Counsel Frank Bolden, rejecting my application for severance because "the decision has been made not to permit participation by an employee in both the Severance Plan and VEREP".

18. My attorney thereafter appealed the denial of my application to the Johnson & Johnson Severance Plan administrator, but received no response.

s/s

ROBERT A. MUSCARELLA

SWORN and SUBSCRIBED to
before me this 28th day
of June, 1995

s/s Joan E. Peculski

NOTARY PUBLIC

JOAN E PECULSKI
Notary Public of New Jersey
My Commission Expires 10/20/97
ID # 54888

[end of page 5]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUT
NO. 98-6408

SANDRA SLAYDON, HAWES,	:	
ROBERT A. MUSCARELLA and	:	TRANSCRIPT OF
MANOHAR B. KADAM,	:	AUDIO TAPE
CAROLYN HOLDER	:	FROM PROCEEDING
Plaintiffs/Appellants	:	
on behalf of themselves	:	
and classes of similarly	:	
situated persons,	:	
	:	
-vs-	:	
	:	
JOHNSON & JOHNSON, et al.,	:	
	:	
Defendants/Appellees.	:	

BEFORE:

BECKER, CHIEF JUDGE
GARTH, CIRCUIT JUDGE AND
POLLAK, DISTRICT JUDGE *

Wednesday, September 22, 1999

* The Honorable Louis H. Pollak, United States District Judge of Pennsylvania, Sitting by Designation.

Appearances:

SELIKOFF & COHEN, ESQS.,
BY: CAROL H. ALLING, ESQ.,
For the Plaintiffs/Appellants.

CARPENTER, BENNETT & MORRISSEY, ESQS.,
BY: FRANCIS X. DEE, ESQ.
For the Defendants/Appellees.

THE COURT: You may proceed.

MS. ALLING: If it would please the court, I am Carol Alling of the law firm Selikoff & Cohen, representing the appellants in this case, Robert Muscarella, Sandra Slaydon Hawes, Carolyn Holder, and the estate of Manohar Kadam. If it would please the court, I would like to reserve three minutes of rebuttal time . . .

THE COURT: Certainly may.

MS. ALLING: . . . at the end of my presentation. There has been extensive briefing in this matter and I'm now going to make presentation to the court now – discuss the matter of whether a de novo or arbitrary and capricious standard applies to the review of the Plan Administrator, or its determination in this case, that the plaintiffs were not entitled to severance because they had chosen to receive enhanced early retirement benefits, rather than a deferred pension benefit at the time of their terminations from employment. I'm not going to discuss the de novo of standard because even under an arbitrary and capricious standard, the Plan Administrator's decision must be set aside if it violated the prohibition upon age discrimination set forth in the Age Discrimination & Employment Act, or New Jersey's law against discrimination; and in particular, those provisions of the federal law, which were added by the Older Workers Benefit Protection Act of 1990. Those amendments specifically were intended by Congress to protect older workers in their benefits.

Defendants argue in this case that their policy of disqualifying those who received enhanced early retirement benefits from severance or separation pay did not treat age protected employees less favorably than non-protected employees because the value of the VEREP pension benefits to which older employees were restricted, exceeded, or equaled the combination of severance and deferred retirement benefits available to younger employees.

Defendants also assert there was no adverse treatment of the pension eligible employees because no employee received more than one type of benefit, denying adverse treatment based on any combination of severance and pensions benefits. Disregard for

the most basic facts in this case which is that plaintiffs were fully qualified for both severance or separation pay -- whichever was higher, and an immediate pension benefit under the VEREP program, while younger employees simply were not. Moreover, the plaintiffs were entitled to each of these benefits for wholly independent and separate reasons. They qualified for severance because their positions had been eliminated, their termination date was set, their department was closed, and they had no jobs. They were qualified for early retirement/ancillary retirement benefits because they were employed on the required date September 16, 1993, they were 50 years of age or older, and had at least seven years service history with the Johnson & Johnson Family of Companies. Termination was not a requirement for VEREP eligibility, and neither was severance eligibility a disqualification from VEREP. On the other side of the fence, with regard to the severance plan, the severance plan specifically provided – explicitly provided that retirement pursuant to a company retirement plan would not disqualify an employee from the severance to which they were otherwise entitled. There was no coordination of benefit provision between the two programs, and no reason, if one found that the plan's documents warranted, they could not qualify for both. But the grounds on which these individuals were disqualified by the plan's administrator is what particularly violated the restrictions of the – of ADEA and the New Jersey Law against discrimination on the basis of age. The plaintiffs were denied severance because they accepted retirement benefits for which they were qualified, at least in part, on the basis of their age. Where different circumstances qualified a single older employee for both severance and pension benefits under different plans, the Third Circuit found in Westinghouse I and Westinghouse II that the combination of severance and pension benefits could no be relied upon to allow an employer to disqualify from severance otherwise qualify older employees simply because they accepted retirement benefits.

THE COURT: Could I – could I interrupt you for just a moment?

MS. ALLING: Sure.

THE COURT: The service aspect of VEREP – what is it

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might have permitted an offset for the value of the service benefit. However, the conditions established by that section were not satisfied in this case, and Johnson & Johnson really has never argued that they were, because the plaintiffs did not receive an immediate and unreduced pension because even with the VEREP enhancements, they were treated as early retirees – their normal pension benefit was reduced by three percent per year for each year they retired before they were age 60 and even the five years added to their age. They were facing a pension reduction for – the largest number of years was five years.

THE COURT: So the VEREP was not a better deal? If it wasn't, why did they take it?

MS. ALLING: It was a – the question, is a better deal than what? Was it a better deal than the . . .

THE COURT: Instead of waiting for their normal retirement and getting both severance and normal retirement, which they could have done just like the younger workers.

MS. ALLING: They had earned the right to the VEREP benefit.

THE COURT: But they didn't have to take it.

MS. ALLING: They didn't have to take it but they didn't have to give it up either. There was nothing in Severance Plan which required them to give up what they had earned – what they were entitled to under all qualifications for VEREP. There was nothing in the Severance Plan which required them to give that up in order to receive the severance benefit and with OWBPA (the Older Worker's Benefit Protection Act) definitions of permissible offsets did not permit the offset of the service benefit because these were not actuarially a reduced pension. In fact, the affidavit John Baldwin -- in the record here and I'll give you the cite to it in a moment – who was the Johnson & Johnson Director of Benefit Programs, he set up a chart that showed that unless you were age 57 you did not receive an actuarially on the reduced pension benefit on the VEREP, in terms of Mr. Baldwin's affidavit -- and the chart that is set forth here, as well as another item in the record – a chart that was circulated to all the people that had to choose whether to take severance or VEREP.

THE COURT: Before your time is up, I want you to answer

Mr. Dee's I thought, rather forceful argument, that these folks are better off, not only not worse off, than the other employees, but better off than the other employees. In which case you don't have any adverse impact and don't make out your prima facie case under McDonald Douglas.

MS. ALLING: The plaintiffs in this case were worse off – the adverse impact they faced should not be assessed in terms of the money, but it is a question of whether they were the only employees selected on the basis of their age and to choose between severance benefits and pension benefits.

THE COURT: You mean there are some – you mean we measure these cases not in terms of monetary benefits whether they be direct or fringed, but in terms of some personal status slight, -- in terms of some abstract or . . .

MS. ALLING: I misspoke. I should not have said the evaluation is not in terms of money. But under the Age Discrimination & Employment Act, 29 623(f) (2) (B) (i) – The Equal Cost/Equal Benefit Rule enacted by Congress for evaluating whether employees benefits are worth more or less than younger workers, in terms of money. That rule, enacted by Congress to reverse the effect of the Betts, and codified this court's decision in Westinghouse II, says you must look at each benefit separately, and you may not combine a pension benefit with a severance benefit – add the two together and say -- and determine whether the benefit is worth more or less in money. You must examine each benefit separately.

THE COURT: What do you do – but, but, it seems to me that you're looking at only part of the picture. You're ignoring the discretionary authority of the Plan Administrator under cases like Jamaica – I mean, it starts with 'My opinion, from Hosier,' and goes down the whole line, the whole line of cases. Where there – Hamilton versus Air Jamaica – you're ignoring the discretion of the Plan Administrator's a) to withdraw welfare benefits – which is what we are talking about here, or at least b) also confirmed by the terms of this – explicate terms of the plan to -- to act the way they did because of the similarity between the service benefit component of VEREP and the severance. You seem to be ignoring those aspects of the equation.

MS. ALLING: In part, that is because if the Plan

Administrator exercises even a very broad discretion, in a way that violates the prohibitions of age discrimination's statutory prohibitions upon age discrimination in determination, is by definition arbitrary and capricious. The other matter to consider in that regard is – a true – an employer may withdraw welfare benefits through a valid plan amendment, but as the Hosier decision recognized, the plan may not be orally amended, the plan may not be amended through informal memos – amendment of a plan to terminate these benefits certainly across the board requires the formal action to amend the plan. The real point here though is that if the – if Plan Administrator's decision violated the prohibitions on age discrimination is by definition arbitrary and capricious and exceeds whatever discretion the Plan Administrator might have.

THE COURT: Ms. Alling, you refer to the statute you aphonously referred to as 'OPA'?

MS. ALLING: O WBPA.

THE COURT: As designed and codified Westinghouse II, I'm not quite clear what the basis on that is. I understand that the Senate and House reports referred to Westinghouse I as something that needed to be resurrected and re-affirmed – am I missing something with Westinghouse II, covered in there too?

MS. ALLING: The -- I'm not suggesting that the Congress itself referred to Westinghouse II, but Westinghouse II, rejected the argument that greater actuarial value cured any age discrimination in disqualifying from severance those who chose to receive an age dependent early retirement benefit and in reaching that conclusion, the court noted that giving the people the option, between an immediate retirement and a deferred retirement if they wanted severance, did not eradicate the discriminatory effect either because, "severance pay is a fringe benefit for which vested or early or selected retirement benefits cannot be a substitute." In incorporating in Section (f) (2) (B) (i) of the Age Discrimination & Employment Act, the equaled cost benefit rule -- Congress required that those benefits be analyzed benefit by benefit just as the court in Westinghouse II required that the benefits be examined to see whether older workers were getting less than younger workers – that that examination being benefit by benefit where the benefits arose from independent

APP.122 PAGE PURPOSELY ABSENT

gentleman and I would be willing to stipulate . . . I think we would be willing to stipulate that word for his word.

THE COURT: Okay. Thank you. Mr. Dee . . .

MR. DEE: May it please the court, my name is Mr. Francis X. Dee of Carpenter, Bennett & Morrissey, and I represent appellees Johnson & Johnson defendants. This is a classic case that gives proof to the adage, no good deed goes unpunished. If we step back and look at what happened here, the PPC (Personal Products Company), the Engineering Department was going to – going through a reorganization and obviously people were going to lose their jobs – and people were entitled to severance pay. Counsel refers to the Milltown Severance Pay – I'm not sure exactly what she's talking about. The only allegations in this complaint as to any violation of the severance plan are to the Johnson & Johnson Severance Plan, so there is a reference attached to Mr. Muscarella's affidavit to one page of some management guideline, and that's never been an issue in this case – the whole issue has been with respect to the Johnson & Johnson Plan that was to have some human resources department name referred to it or to a different plan. As a matter of fact, in dealing with the classification issue, Counsel specifically said, that they were not seeking benefits under the PPC Plan and that's in Joint Appendix JA292, so I don't know where that no found plan took into flight here. We've always talking about the Johnson & Johnson Severance Plan, which is attached to the exhibit of complaint. So what happened here was that these people were eligible for severance if in fact they were terminated as was originally intended, but the problem came about because the corporation had instituted the VEREP Plan, which was a voluntary plan designed to have people leave the corporation voluntarily throughout the entire Johnson & Johnson Family of Companies. But each individual company could make a decision as to whether to opt into the VEREP Plan, which for some companies, didn't want to have people leave – they were sufficiently staffed and they needed people – other companies did.

THE COURT: When you say 'companies,' you referring to other departments or divisions . . .

MR. DEE: The Severance Plan – the VEREP Plan was

available throughout the entire Johnson & Johnson Family of Companies, which included various separate corporations – various business units and each business unit had a different type of problem. Some business units needed people, other business units were fine in terms of their levels of employment, and others were over-staffed, and so each company, a business unit had a right to decide whether they opt into the VEREP plan and make that available to their employees . . .

THE COURT: Is that regardless of whether or not they were eliminating positions.

MR. DEE: Yes. Yes. Now what happened here, the whole design really was not to apply the VEREP plan if they were eliminating positions. The idea of the VEREP Plan was to make the plan available voluntarily, so that they wouldn't have to terminate people – and then that was the whole approach. Rather than terminate people and create ill-will and so and so forth, they wanted people to leave voluntarily with a generous package. Now what happened here, is before the VEREP Plan became – came into effect or became public, the Personal Private Company was reorganizing its engineering department and people were notified about that. So when VEREP was announced, then the question became well, is it fair not to allow these people to also participate in the VEREP, because but for the timing, if the VEREP had come out before, perhaps they would have been made eligible for the VEREP and we wouldn't have the issue of involuntary terminating anybody. So the Company, which is why I say no good deed goes unpunished, they could have just sat back and said, 'hey, you're out of luck – we're not going to offer the VEREP to you.' So instead, they did what I think was appropriate, and they offered the VEREP to these individuals. But they said, you can't get both. Okay. Now . . .

THE COURT: Where did they say that—that you can't get both – because I saw that in your brief, but I couldn't find any citation to any document or writing that said you can't get VEREP and you can't – if you take VEREP, you can't get severance and you can't get medical insurance benefits and pension, whatever.

MR. DEE: Well, since this came up on summary

judgement, there were some factual disputes below that we did not get into there because obviously on summary judgement we had similar facts that were most favorable to plaintiffs. So, there were – the factual disputes were that there were some seminars and so and so forth, where these questions were answered. But there is one fact not in dispute – and that is Joint Appendix page 189, which is a letter from Mr. Bob Ropiko to Mr. Muscarella, dated October 25, 1993, where he says, and I quote, "As requested, this confirms our conversation regarding VEREP. If you take VEREP, you are not eligible for the separation package as outlined in the meeting of August 20, 1993. It is your choice, you are eligible for the separation package or VEREP, not both." And that is not in dispute obviously, Mr. Muscarella received that. Now he had until October 30 after receiving this letter, if he wanted to change his mind and decide he was going to take the severance. Now, just so – there is some confusion in the record, and just so we're clear on that – there was the PPC severance package, which counsel refers to as providing for a greater level of benefits – but that was an enhanced severance package in return for signing a release, and that's never been an issue in the case because none of the plaintiffs here chose. . .

THE COURT: Signed a . . .

MR. DEE: Yeah. Now, as I look at this case, what we have – is we have the two issues, the _____ clause and the classification issue. We have the issue under ERISA, as to whether or not the plan administrator's determination that these individuals could not get both severance and the VEREP, whether that is arbitrary and capricious. I was mindful of the argument this morning regarding the insurance company, concerning that the applicability of that standard, but there is no conflict here and no issue with respect to that area – it has never been raised. The plaintiffs and we have always assumed the arbitrary and capricious standard applied.

Now there are three provisions in the severance plan that are applicable. The first one is the section that deals with . . . Section 4 of pages 12 through 14 of our brief. The first provision deals with the initial eligibility and also the disqualification for severance under the severance plan and in that regard, the triggering events is termination. Now here, there is no question

that the plaintiffs – these plaintiffs would have been terminated had they not taken the VEREP, but that's not the issue in terms of the eligibility question. The question here is, what was it that ultimately happened to them, because what really happened is that if the VEREP had not been made available to them, yes, they would have been terminated. But since VEREP was made available to them as an option, their termination occurred not by virtue of involuntary termination, which would trigger severance, but rather, voluntary termination, which triggers the VEREP. The two triggering events are mutually exclusive. They cannot have an involuntary termination under severance and still be eligible for VEREP, nor can they have a voluntary termination under VEREP and be eligible for severance. They are mutually exclusive.

THE COURT: Did anybody other than Mr. Muscarelli get the letter that is shown on – that you just read to us from Joint Appendix on page 189?

MR. DEE: The record does not reflect that -- and that gets back to the issue – there were all sorts of seminars where people were told this. There are some disputes in the record. Of course, we did not get into that because we could not resolve disputes on summary judgements. You have then, which is quoted on the top of page 13 of our brief, another disqualifying event, and that is 'Such other reasons as the pension committee shall in its sole discretion, determine to cause the denying of benefits under the plan" – and that is directly applicable here because what really happened, is that since we made the VEREP plan available to this group, the Company obviously did so, knowing that it had this provision in the severance plan to be able to say, 'Hey look, we're making VEREP available to you, but you can't get severance – you can't double-dip.' Okay, and I like to think of it as – you know, if I said to my two daughters, you can get a bologna sandwich you know with bread and bologna and all that and I said to my two sons, you got a choice, you can have the bologna sandwich, but you know, since you guys eat more and you've been around longer, so on and so forth, we're going to give you a steak sandwich. You got a choice. You can't take both. You can get the same bologna sandwich your daughter – your sister's have, but if you don't want that, you get more – you

can get the steak sandwich. So they obviously are not being treated adversely. They had a choice. That gets to the age issue. But with respect to the disqualification . . .—

THE COURT: But your friend says they are being treated adversely. You heard her.

MR. DEE: Yes.

THE COURT: Because there was a difference between the service and the severance in terms, and I think in one of the briefs it shows -- it shows a percentile. Apparently one of them gets four percent less, and the other one gets some other percentage less, but she said because the caps are different.

MR. DEE: Well.

THE COURT: Now, I don't know whether that is so or not, but you can explain that.

MR. DEE: The caps are different between the severance plan and the VEREP plan with respect to the service benefit, but the caps do not effect any of the plaintiffs.

THE COURT: What about the fact that – there is a different – I think she mentioned that somebody who worked for two years would get one sum, whereas somebody who worked for, lets say 15 years would get another sum that would be higher under the severance benefit.

MR. DEE: I'm not sure what she's talking about there.

THE COURT: Okay. Well, I wasn't either.

MR. DEE: There's a one page – there's a one page excerpt in the record attached to Mr. Muscarella's affidavit that is really not a plan. It is a one page except and it doesn't – it's not clear to me whether that is what counsel is referring to or whether she's referring to the enhanced severance with respect to the release that was offered. The enhanced severance was a greater severance than either the severance plan benefit or the VEREP service benefit.

THE COURT: Well, maybe she can clear it up when she gets up.

MR. DEE: But, but the big issue there – that has never been an issue in this case, until -- until now. Although, the only question was for severance pay plan which was attached to the complaint – and now counsel is bringing in – attempting to bring in another plan, and the only thing we have in the record with

respect to that is if I'm understanding her correctly, is this one page excerpt that was never an issue, and it isn't an entire document. So you have in terms of eligibility for the severance plan – you have the fact that they did not terminate involuntarily because the very fact that they chose VEREP meant that it was a voluntary termination and therefore, they were not eligible for the severance plan – and I might add, there is a provision that talks about an exception to the disqualifying event that says, "Retirement, except in its apparent _____", as quoted on the bottom of page 12 of our brief. That, quite frankly, is designed to deal with the problem – perhaps you want to refer to it as a Westinghouse problem, where somebody is entitled to a retirement benefit -- if they then choose – and they get terminated involuntarily, and they choose to retire because they are eligible for retirement, this says, and we put it in there ourselves, you're not deprived of the severance benefit – you get both, the severance and a retirement – and that is what that refers to. Here, is what we have is a situation where the Company, because there was not involuntary termination that ultimately led them out the door, it was a voluntary termination via the VEREP. They were not qualified for the severance because of this Subsection 8, which is quoted on the top of page 13 of our brief, the pension committee had the right to say this severance benefit is not going to be paid to anybody who got VEREP, and thirdly, on the middle of page 13 of our brief, we have another provision that gives the pension committee very broad discretion and quite frankly says, "and may impose such other eligibility conditions on payment of benefits as may be deemed advisable;" and that's we get into the Linker versus Bethlehem Steele case and the Hamilton versus Air Jamaica case. Those cases say quite clearly, that even in situations where the company is making a case by case analysis, take in the situation and applying the terms of the plan – that that's okay, it's not illusionally and so on and so forth. And that really stems from the fact that there is a difference between pension benefits where the statute – ARISA actually regulates the substance of content. With a pension plan, as opposed to welfare benefits, which a severance plan is, where ARISA does not regulate the substance of the content. But the Company has to follow the terms of the

plan. Counsel has made a reference that in fact, we needed something in writing for a written amendment to the plan, but then misses the boat, because we weren't amending the plan in making this determination. We were taking the existing plan and interpreting these three provisions – so it is not an amendment to the plan and it shouldn't be treated as such. Now, with respect to the – my position quite clearly is that we have, with particularly the arbitrary and capricious standard, we had the right to deny the severance under ARISA and under the plan. Now, our next question becomes was it in violation of the age act? Well, first of all, there was no adverse treatment and that really isn't the big key. Counsel gets into the safe harbor, provisions - - 623(f) (2) and *I*2, and so and so forth . . . those are safe harbor positions – provisions. They are not – they don't define what is unlawful. Now, I recognize that in the case, the U.S. Supreme Court addressing issue kind of reversed it – this court in Westinghouse, had analyzed it the way I think it ought to be analyzed, namely that you look to see if there is a violation of the statute to begin with, and then you look at these safe harbor provisions or affirmative . . .

THE COURT: Tell us in practical terms, Mr. Dee why these people are better off and not worse off.

MR. DEE: Okay. Two reasons. First of all they had a choice. They could take their severance benefit and they could take the retirement that they were entitled to. That was the same as the younger people had. So they got the exact – one of their choices, was exactly the same that they were entitled to, and exactly the same as the younger people had. They had an additional option, and that is that they could take the VEREP benefit, and the VEREP benefit was a very good benefit and that's why you're not going to see anybody refuse it. The VEREP benefit permitted . . .

THE COURT: You know about godfather offers in North Jersey, is that the idea, Mr. Dee?

MR. DEE: I'm not sure who he is. . . No, we didn't do that. We didn't do that.

THE COURT: Mr. Dee, maybe you can explain why – why the option here is a legitimate one, as distinct from the option which this court said in Westinghouse II was not a

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 81 - SUPREME COURT
28 USC Sec. 1254
Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

TITLE 29 - LABOR
CHAPTER 14 - AGE DISCRIMINATION IN EMPLOYMENT
29 USC Sec. 621
Sec. 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that -

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub. L. 90-202, Sec. 2, Dec. 15, 1967, 81 Stat. 602.)

Short tittle of 1990 Amendment. Pub. L. 101-433, Sec. 1, Oct. 16, 1990, 104 Stat. 978, provided that: "This Act (amending sections 623, 626, and 630 of this title and enacting provisions set out as notes under this section and sections 623 and 626 of this title) may be cited as the 'Older Workers Benefit Protection Act'."

Congressional Statement of Findings. Pub. L. 101-433, title I, Sec. 101, Oct. 16, 1990, 104 Stat. 978, provided that: "The Congress finds that, as a result of the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations."

TITLE 29 - LABOR
29 USC Sec. 623
Sec. 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization -

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section -

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan-

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection -

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(k) Date of adoption of system or plan

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

***(l)* Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits**

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age -

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii):

are deducted from severance pay made available as a result of the contingent event unrelated to age.

Effective Date of 1990 Amendment. Section 105 of title I of Pub. L. 101-433, as amended by Pub. L. 102-236, Sec. 9, Dec. 12, 1991, 105 Stat. 1816, provided that:

(a) In General. - Except as otherwise provided in this section, this title (amending this section and section 630 of this title and enacting provisions set out as notes under this section and section 621 of this title) and the amendments made by this title shall apply only to -

(1) any employee benefit established or modified on or after the date of enactment of this Act (Oct. 16, 1990); and

(2) other conduct occurring more than 180 days after the date of enactment of this Act.

TITLE 29 - LABOR
29 USC Sec. 626
Sec. 626. Record keeping, investigation, and enforcement

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

TITLE 29 - LABOR
29 USC Sec. 630
Sec. 630. Definitions

For the purposes of this chapter -

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30,1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(*l*) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide plan.

TITLE 29 - LABOR
29 USC Sec. 631
Sec. 631. Age limits

a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

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29 USC Sec. 1001
CHAPTER 18 - EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I - PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A - General Provisions

Sec. 1001. Congressional finding and declarations of policy.

Sec. 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension plan.

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
PART 1625--AGE DISCRIMINATION IN EMPLOYMENT ACT
Subpart A--Interpretations

Sec. 1625.10 Costs and benefits under employee benefit plans.

(a)(1) General. Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals.
The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following sections explain three key elements of the exception:

(i) What a "bona fide employee benefit plan" is;
(ii) What it means to "observe the terms" of such a plan; and
(iii) What kind of plan, or plan provision, would be considered "a subterfuge to evade the purposes of [the] Act."

There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans.

(a)(2) Relation of section 4(f)(2) to sections 4(a), 4(b) and 4(c). Sections 4(a), 4(b) and 4(c) prohibit specified acts of discrimination on the basis of age. Section 4(a) in particular makes it unlawful for an employer to `"discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * *." Section 4(f)(2) is an exception to this general prohibition. Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), and accordingly the practice does not have to be justified under section 4(f)(2).

(b) Bona fide employee benefit plan. Section 4(f)(2) applies only to bona fide employee benefit plans. A plan is considered `"bona fide" if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. For these purposes, it would be sufficient under the ADEA for employers to follow the disclosure requirements of ERISA and the regulations thereunder. The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate. An "employee benefit plan" is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as "fringe benefits." The term does not refer to wages or salary in cash; neither section 4(f)(2) nor any other section of the Act excuses the payment of lower wages or salary to older employees on account of age. Whether or not any particular employee benefit plan may lawfully provide lower benefits to older employees on account of age depends on whether all of the elements of the exception have been met. An "employee-pay-all" employee benefit plan is one of the "terms, conditions, or privileges of employment" with respect to which discrimination on the basis of age is forbidden under section 4(a)(1). In such a plan, benefits for older workers may be reduced only to the

extent and according to the same principles as apply to other plans under section 4(f)(2).

(c) "To observe the terms" of a plan. In order for a bona fide employee benefit plan which provides lower benefits to older employees on account of age to be within the section 4(f)(2) exception, the lower benefits must be provided in "observ[ance of] the terms of" the plan. As this statutory text makes clear, the section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer, employment agency, or labor organization is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply. Important purposes are served by this requirement. Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

(d) Subterfuge. In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must not be "a subterfuge to evade the purposes of [the] Act." In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations. (The only exception to this general rule is with respect to certain retirement plans. See paragraph (f)(4) of this section.) There are certain other requirements that must be met in order for a plan not to be a subterfuge. These requirements are set forth below.

(d)(1) Cost data--general. Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years. An employer may rely in cost data for

its own employees over such a period, or on cost data for a larger group of similarly situated employees. Sometimes, as a result of experience rating or other causes, an employer incurs costs that differ significantly from costs for a group of similarly situated employees. Such an employer may not rely on cost data for the similarly situated employees where such reliance would result in significantly lower benefits for its own older employees. Where reliable cost information is not availlable, reasonable projections made from existing cost data meeting the standards set forth above will be considered acceptable.

(d)(2) Cost data--Individual benefit basis and "benefit package" basis. Cost comparisons and adjustments under section 4(f)(2) must be made on a benefit-by-benefit basis or on a "benefit package" basis, as described below.

(i) Benefit-by-benefit basis. Adjustments made on a benefit-by-benefit basis must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designed for the same contingency, such as death. See paragraph (f)(1) of this section.

(ii) "Benefit package" basis. As an alternative to the benefit-by-benefit basis, cost comparisons and adjustments under section 4(f)(2) may be made on a limited "benefit package" basis. Under this approach, subject to the limitations described below, cost comparisons and adjustments can be made with respect to section 4(f)(2) plans in the aggregate. This alternative basis provides greater flexibility than a benefit-by-benefit basis in order to carry out the declared statutory purpose "to help employers and workers find ways of meeting problems arising from the impact of age on employment." A "benefit package" approach is an alternative approach consistent with this purpose and with the general purpose of section 4(f)(2) only if it is not used to reduce the cost to the employer or the favorability to the employees of overall employee benefits for older employees. A "benefit package" approach used for either of these purposes would be a subterfuge to evade the purposes of the Act. In order to assure that with such a "benefit package" paragraph approach is not abused and is consistent the legislative intent, it is

subject to the limitations described in (f), which also includes a general example.

(d)(7) Involuntary retirement clauses. Any provision of an employee benefit plan which requires or permits the involuntary retirement of any individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purpose of the Act and cannot be excused under section 4(f)(2).

(f)(2) "Benefit package" approach. A "benefit package" approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer and no less favorable benefits for employees. As previously noted, in order to assure that such an approach is used for the benefit of older workers and not to their detriment, and is otherwise consistent with the legislative intent, it is subject to limitations as set forth below:

(f) (2) (ii) A benefit package approach shall not apply to a retirement or pension plan. The 1978 legislative history sets forth specific and comprehensive rules governing such plans, which have been adopted above. These rules are not tied to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans. Variations from these special rules are therefore not justified by variations from the cost-based benefit-by-benefit approach in other benefit plans, nor may variations from the special rules governing pension and retirement plans justify variations from the benefit-by-benefit approach in other benefit plans.

(f) (2) (iv) A benefit reduction greater than would be justified under a benefit-by-benefit approach must be offset by another benefit available to the same employees. No employees may be deprived because of age of one benefit without an offsetting benefit being made available to them.

[44 FR 30658, May 25, 1979, as amended at 52 FR 8448, Mar. 18, 1987. Redesignated and amended at 52 FR 23812, June 25, 1987; 53 FR 5973, Feb. 29, 1988]

CITATIONS FROM DEFENDANTS' REPLY BRIEF ON APPEAL

FROM PAGE 14:

Eligible PPC engineering department employees also were offered the opportunity to participate in a **special separation pay program applicable to the department closing.** That program provided **greater separation pay** than was provided under the Severance Plan, in exchange for a release of all claims. (Ja331,368-71). **None of the plaintiffs elected to participate in that program.** (Id.) (emphasis added)

FROM PAGE 18:

Plaintiffs' ADEA claims fail as a matter of law because, as the district court recognized, plaintiffs were not treated adversely to younger employees. Plaintiffs could have elected to receive exactly what younger employees received: Severance Plan benefits and, at any eligible retirement age their full vested pension benefits without any offset between the two. Instead, plaintiffs elected to receive VEREP benefits - **to which they had no accrued or vested right**, which no younger employee received, and which indisputably were more valuable than Severance Plan benefits - plus their full vested pension benefits. Plaintiffs **were treated better, not worse,** than younger employees. That is not discrimination. Further, plaintiffs' ADEA claims fail because the **denial** of Severance Plan benefits was based on their **elections to retire** under VEREP and not age. As a matter of law, a decision based on a factor other than age, even if it correlates with age, does not violate ADEA. Because the district court correctly held that plaintiffs **could not establish a prima facie case** under ADEA, **it did not have to reach affirmative defenses** to ADEA liability amended or added by the Older Workers Benefits Protection Act of 1991 ("OWBPA"), 29 U.S.C. §623(f)(2) and (*l*)(2). (emphasis added)

FROM PAGES 39-40:

The dispositive point remains that no plaintiff or **other employee, younger or older**, was required to choose between vested pension benefits and severance pay. Plaintiffs' only choice involved a special, one-time only enhanced benefit program to which plaintiffs had no

pre-existing entitlement and that was unavailable to younger employees. Plaintiffs thus were given the choice to receive everything any younger employee could receive (severance pay and vested pension benefits) or something more (VEREP benefits, including the Service Benefit, plus vested pension benefits). Because plaintiffs were not treated adversely, the district court correctly dismissed their ADEA claims as a mater of law.

(5)

No. 99-1850

Supreme Court, U.S.
FILED
JUN 16 2000
CLERK

IN THE

Supreme Court of the United States

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA, MANOHAR B. KADAM, CAROLYN HOLDER,

Petitioners,

—v.—

JOHNSON & JOHNSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that petitioners had failed to establish claims of age discrimination where they were not treated adversely to younger employees and, instead, were given an additional option not available to younger employees to receive enhanced benefits in addition to their vested pension benefits?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties are listed in the Petition at pp. iii-vi, except that Vanita Kadam as the administrator of the Estate of Manohar Kadam was substituted for Manohar Kadam. Respondent Johnson & Johnson has no parent corporation, and there is no corporation owning 10% or more of its stock. Johnson & Johnson subsidiaries and affiliates are also named as parties, as identified in the Petition at pp. iii-vi. No other corporation is a parent or owns 10% or more of the stock of those subsidiaries and affiliates.

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IN THE

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SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA, MANOHAR B. KADAM, CAROLYN HOLDER,

Petitioners,

—v.—

JOHNSON & JOHNSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit is unreported. It is reprinted at App. 1-20. The opinions of the United States District Court for the District of New Jersey granting summary judgment are unreported and are reprinted at App. 24-31 and 39-43. The opinion of the District Court denying class certification is unreported and reprinted at App. 32-38.

JURISDICTION

The judgment of the Court of Appeals was filed on October 20, 1999. (App. 16-17). Petitioners filed a petition for rehearing or rehearing *en banc* on November 2, 1999. That petition was denied by the Court of Appeals by Order entered on December 30, 1999. (App. 19).

By Orders entered March 1, 2000 and April 12, 2000, this Court granted petitioners' applications for extensions of time to file their petition for writ of certiorari. The second extension was to May 16, 2000.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted at App. 130-37.

STATEMENT OF THE CASE

A. Introduction

Petitioners' claims arise from their elections to participate in a voluntary early retirement program offered by their employer as part of a reduction in force. Under that program, each petitioner agreed to voluntarily retire in exchange for a substantial benefit package to which he or she had no prior entitlement or right. (App. 8; J.A. 330, 364-67, 577-78). Petitioner Muscarella, for example, received enhancements to his pension with a present value that exceeded $170,000 (over and above his accrued and vested pension), plus a "Service Benefit" equal to $67,800, plus retiree medical and life insurance benefits to which he otherwise was not entitled. Because they elected to retire under the enhanced benefit program, petitioners were not eligible to also receive severance benefits, which were worth substantially less than the enhanced benefits they received. (App. 9, 11). Petitioners' accrued and vested pension

benefits were not affected by their elections. (App. 14). Their accrued and vested benefits were not offset by or used to offset any other benefits. (*Id.*)

Petitioners claimed that the denial of severance benefits violated ERISA. Further, although petitioners received substantially greater benefits than did younger employees, they claimed age discrimination in violation of the ADEA as amended by the OWBPA.

B. Petitioners' Employment and the Closing of Their Department

Petitioners were employed by McNeil-PPC, Inc. ("Personal Products Company" or "PPC"), a subsidiary of Johnson & Johnson, until they retired on December 1, 1993. (App. 7). Until October 30, 1993, petitioners worked in PPC's engineering department. (J.A.54, 117). On August 20, 1993, PPC announced that its engineering department would be closed on October 30, 1993. (J.A.69-70). As a result, all positions in the department, including plaintiffs' positions, were scheduled to be eliminated on October 30, 1993. (*Id.*) Several employees were transferred to or obtained positions in other departments or companies affiliated with PPC. (J.A.92). Petitioners similarly had the opportunity to obtain other positions, and, thereby, continue their employment.

The District Court and a jury rejected petitioners' claims of age discrimination (and discrimination on other grounds) in connection with the elimination of their positions. (J.A.602, 641). Petitioners did not appeal from the court's rulings or the jury's findings in these respects.

C. VEREP

On September 1, 1993, shortly after the closing of its engineering department was announced, PPC announced that it would participate in VEREP, short for the Voluntary Early Retirement Enhancement Program. (J.A.71, 330, 387).

VEREP was a limited duration program, available only in the late Summer and Fall of 1993. (J.A.387, 503). It offered eligible employees a one-time opportunity to voluntarily retire with enhanced benefits. (*Id.*) To be eligible for VEREP, employees were required to be actively employed, meet certain service requirements, and have attained age 50. (J.A.71, 390, 503). Employees who elected to participate in VEREP agreed to voluntarily retire on December 1, 1993. (J.A.391, 503).

VEREP provided three separate benefits or benefit enhancements to participants. First, it gave participants an additional five years of age and an additional three years of credited service for pension purposes under the pension plan, thereby significantly enhancing their pension benefits under that plan. (J.A.330, 387, 503). This allowed participants who were between ages 50 and 55 to obtain an immediate pension, which ordinarily was not available until at least age 55. (*Id.*, Ja410, 441). Also, the addition of years of service and age to the pension formula increased the amount of a participant's pension above and beyond his or her accrued and vested benefit. (J.A.330, 387, 410, 440, 442). This increase was substantial. For example, for a participant who was 55 years of age with 20 years of service, VEREP's addition of three years of service increased his or her pension by 15% and VEREP's addition of five years of age increased his or her pension by another 28%—both in addition to the individual's previously accrued and vested benefit. (J.A.410, 440, 442; see also Ja220-22).

Second, VEREP made participants immediately eligible for retiree medical and life insurance benefits. (J.A.330, 387).

Third, VEREP provided what it called a "Service Benefit." (J.A.330-31, 387, 503). The Service Benefit was equal to the benefit provided under the Severance Plan—two weeks of regular base pay for each full year of service. (*Id.*)

Further, at the employee's election, the VEREP Service Benefit was paid by monthly payments equal to the individual's monthly salary, thereby effectively continuing that salary for a period after termination. (J.A.397, 504).

D. Petitioners' Elections to Participate in VEREP

Petitioners each elected to participate in VEREP and retired from employment on December 1, 1993. (J.A.330, 364-67, 577-78).

As noted, VEREP was only available to active employees. (J.A.387). Petitioners were still active employees during the VEREP election period, which preceded the October 30, 1993 closing of the engineering department. (*Id.*) After the department closed and petitioners' positions were eliminated on October 30, 1993, each petitioner's employment continued until he or she retired on December 1, 1993. (J.A.161, 167, 190). By contrast, other persons affected by the closing of the engineering department who were not eligible for VEREP or who did not find other positions were terminated from employment on October 30, 1993. (J.A.70).

As a result of their elections to retire under VEREP, each petitioner received the substantial VEREP benefits and benefit enhancements he or she otherwise could not have received. These benefits included the Service Benefit, which benefit alone was equal to Severance Plan benefits. (App. 8-9, 10-11; J.A.331).

E. Severance Plan

The Severance Plan in which Personal Products Company participated was established by Johnson & Johnson and administered by the Pension Committee of the Board of Directors of Johnson & Johnson. (J.A.109, 112). The Severance Plan provided severance pay to eligible participants, generally in the amount of two weeks of salary for each year of credited service. (J.A.113d, § 5.1).

The Severance Plan provided benefits in the event of certain involuntary terminations of employment. Section 4.1(a) of the Plan defines the "Severance Events" triggering eligibility for severance benefits:

> [A] participant shall be eligible for the benefits provided in Article 5 if his or her employment with the Company is involuntarily and permanently terminated as the result of any one of the following events:
>
> i. Position elimination;
>
> ii. A participant's inability to meet the requirements of his or her position;
>
> iii. Reduction in force, or
>
> iv. For such other reasons as the Pension Committee may, in its sole discretion, deem appropriate.

(J.A.113b, § 4.1(a)). Section 4.1(b) then sets forth disqualifying events:

> A participant is not eligible for the benefits provided in Article 5 if his or her employment is terminated as a result of any one of the following events:
>
> * * *
>
> ii. Retirement (except that a Participant whose employment is terminated as a result of an event listed in Article 4.1(a) and who elects to retire under a retirement plan of the Company shall be granted severance pay hereunder);
>
> * * *
>
> viii. Such other reasons as the Pension Committee shall, in its sole discretion, determine to be cause for denying benefits under the Plan.

(J.A.113b-c, § 4.1(b)).

As reflected in Sections 4.1(a)(iv) and 4.1(b)(viii), the Severance Plan conferred broad discretion on the Pension Committee not only to interpret the Plan and its eligibility provisions, but also to impose additional conditions of eligibility or disqualification not set forth in the Plan. Section 4.3 of the Severance Plan confirmed the Pension Committee's discretion both to interpret and impose eligibility conditions:

> The Pension Committee shall, in its sole discretion, determine whether or not a Severance Event has occurred with respect to a Participant and may impose such other eligibility conditions on payment of benefits hereunder as it may deem advisable. The Pension Committee shall have absolute discretion in interpreting and applying the terms of this Plan.

(J.A.113c, § 4.3).

In addition, Section 5.1(d) of the Severance Plan gave the Pension Committee discretion to offset Severance Plan benefits by any payment under any other plan or other source that the Pension Committee deemed to be "similar":

> The Pension Committee may, in its sole discretion, authorize a reduction in severance pay to a Participant hereunder by the amount of any discharge, dismissal, or severance allowance or similar payment to which the Participant is or shall be entitled by reason of any law, regulation, ruling, legal proceeding, other Plan of the Company, or other plan to which the Company directly or indirectly contributes, to the extent such amount is not attributable to the Participant's own contributions.

(J.A.113d, § 5.1(d)).

Eligible PPC engineering department employees also were offered the opportunity to participate in a special separation pay program applicable to the department closing. That program provided greater separation pay than was provided

under the Severance Plan, in exchange for a release of all claims. (J.A.331, 368-71). None of the petitioners elected to participate in that program. (*Id.*)

F. Plaintiffs' Claims for Severance Pay

After retiring under VEREP, petitioners sought severance benefits under the Severance Plan. (J.A.372, 373, 376, 581). Their applications were denied by the plan administrator on the grounds that they were not eligible because of their participation in VEREP. (*Id.*, Ja378-79, 379-80, 580).

Following petitioners' requests for further review of their claims, they filed their respective complaints starting this action. Other than the four petitioners, no individuals in any Johnson & Johnson company who elected to participate in VEREP applied for Severance Plan benefits. (J.A.225, 229, 232, 235, 237, 240, 242, 251, 253, 255).

G. Decisions Below

The Court of Appeals affirmed the District Court's judgment, on defendants' motion for summary judgment, that the denial of petitioners' applications for severance benefits did not violate ERISA, the ADEA, or the New Jersey Law Against Discrimination. (App. 15). With respect to the ERISA claims, the Court of Appeals noted that § 5.1(d) of the Severance Plan reserved to the plan administrator the discretion to reduce any severance benefit by the amount of any "similar payment" to which a participant might be entitled. (App. 7, 11). The court then found that Severance Plan benefits and VEREP's Service Benefit were substantially similar in nature and amount. (App. 11). Therefore, the court concluded, the plan administrator properly exercised its discretion under § 5.1(d) to determine that petitioners were not entitled to any additional benefits under the Severance Plan. (*Id.*)

On petitioners' discrimination claims, the Court of Appeals agreed with the District Court that it was not necessary to reach the "safe harbors" or "affirmative defenses" established by OWBPA because the petitioners had not established *prima facie* cases of age discrimination. (App. 15). The court noted that OWBPA "did not change the fundamental tenet of any discrimination claim—that an employer treat members of the protected class (here, those over the age of forty) adversely." (App. 12). The court found that, in this case, the petitioners were not treated adversely to younger employees. First, the court observed,

> the named plaintiffs, and others over the age of fifty, were treated *more* favorably than their younger counterparts insofar as they were given a choice between two different options; one that provided benefits identical to those employees and another that provided *greater* benefits than were given to younger employees.

(App. 12; emphasis added). Second, the court noted that petitioners' claims did not implicate vested benefits: "Johnson & Johnson did not deduct *vested* severance benefits from *vested* pension benefits." (App. 14; emphasis in original). Instead, the court determined that petitioners were merely given an option of electing enhanced benefits unavailable to younger employees, such that "older employees were indeed the favored class." (*Id.*) The court then held that it was not necessary to reach the affirmative defenses regarding benefits established by OWBPA because "plaintiffs have not met their initial burden to prove adverse treatment" to establish a *prima facie* claim of discrimination. (App. 15).

The Court of Appeals did not review the District Court's denial of class certification, finding that it was mooted by the affirmance of the dismissal of the petitioners' claims. (App. 15). The District Court had denied class certification as to the ERISA claims based on its determination that petitioners' claims were not typical of any claims that might be

asserted on behalf of a proposed class and that the petitioners were not adequate representatives of the proposed class. (App. 35-37). The District Court relied primarily on the fact that, unlike the petitioners, none of the proposed class members had applied for severance benefits; therefore, the proposed class claims would be subject to a substantial defense not applicable to the petitioners' claims. (*Id.*) In addition, the court found that petitioners and the proposed class members were not similarly situated. (App. 37-38). The proposed class was fractured by significant differences and individual questions of fact. These questions included whether individuals retired under the VEREP program, and whether individuals were subject to a position elimination or reduction-in-force at the time they elected to retire. Other issues depended on an individual's salary, years of service, and age at the time of his or her separation from employment, such as whether the individual received an "unreduced" pension permitting offset under 29 U.S.C. § 623(l)(2)(A)(ii) or whether any severance pay would be offset by the value of health benefits under 29 U.S.C. § 623(l)(2)(A). Therefore, the District Court denied class certification as to all claims.

REASONS FOR DENYING THE WRIT

A. The Primary Question that Petitioners Seek to Present Was Not Reached by the Courts Below, Is Not the Subject of a Conflict, and Presents No Other Basis for Review by this Court.

The primary question presented in the Petition concerns amendments to the ADEA by OWBPA setting forth affirmative defenses for the offset or reduction of employee benefits that otherwise would violate the ADEA. The Third Circuit held that these affirmative defenses did not have to be addressed in this case because the petitioners had not

established initial cases of discrimination. (App. 15). The court's decision follows the similar conclusion of the Court of Appeals for the District of Columbia Circuit in *May v. Shuttle, Inc.*, 129 F.3d 165, 174-75 (D.C. Cir. 1997). There is no conflict on this issue, and petitioners point to none.

As the court below observed, the OWBPA provisions on which petitioners seek to rely are affirmative defenses or "safe harbors." (App. 15). *Accord Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997). These provisions do not set forth prohibitions. Instead, as the statutory language itself makes clear, they define certain conduct that is lawful notwithstanding that it might otherwise violate other sections of the ADEA. 29 U.S.C. § 623(f)(2) ("It shall not be unlawful for an employer to take any action otherwise prohibited under subsection (a), (b), (c) or (e) of this section. . . ."); 29 U.S.C. § 623(1)(2)(A) ("It shall not be a violation of subsection (a), (b), (c) or (e) solely because. . . .").

Thus, there is no need to reach these affirmative defenses unless the challenged action otherwise would violate the ADEA, that is, that the action discriminates against the plaintiff on the basis of age. This was the structure of 29 U.S.C. § 623(f)(2) before the OWBPA amendments in 1990. *See Public Employees v. Betts*, 492 U.S. 158, 161, 165-66 (1989); *E.E.O.C. v. Westinghouse Elec. Co.*, 869 F.2d 696, 706-09 (3d Cir. 1989), *vacated* (in light of *Betts*), 493 U.S. 801 (1989) (addressing the pre-OWBPA 29 U.S.C. § 623(f)(2) "defense" only after finding a *prima facie* case of age discrimination). OWBPA maintained this structure in 29 U.S.C. § 623(f)(2) and the additional defenses added in 29 U.S.C. § 623(l). As the regulation adopted in the OWBPA amendment to 29 U.S.C. § 623(f)(2) recognizes:

> As [the] statutory text makes clear, the section 4(f)(2) exception [29 U.S.C. § 623(f)(2)] is limited to otherwise discriminatory actions. . . .

29 CFR § 1625.10(c). The Third Circuit's determination in this respect is consistent with the decision of the Court of Appeals for the District of Columbia Circuit in *May v. Shuttle, Inc.*, *supra*, which, in a similar situation, did not reach the OWBPA affirmative defenses because the plaintiffs had not established a *prima facie* violation of the ADEA.

Because the courts below held that petitioners were not treated adversely on the basis of age, they did not need to address the OWBPA affirmative defense to age discrimination claims. Therefore, the Petition does not properly present the question of how those defenses should be interpreted or applied.

Further, there is no basis for this Court to review the determination that the petitioners in this case were not treated adversely on the basis of age. That determination was based on the applications of established principles of the elements of a *prima facie* case of age discrimination to the specific facts of this case. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (U.S., June 12, 2000).

In any event, the determination by the Court of Appeals was correct. Under the ADEA, an age discrimination claim requires adverse treatment based on age. 29 U.S.C. § 623(a). There is no actionable age discrimination without adverse treatment—that is, the treatment of older workers less favorably than younger workers. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608-11 (1993).

In this case, the facts are that petitioners were not treated adversely to younger employees. Instead, petitioners' complaint is that they should have received something unavailable to any other employee, younger or older: both enhanced benefits under VEREP, including a Service Benefit, *and* Severance Plan benefits. Petitioners were not in any way required to choose between their vested pension benefits and Severance Plan benefits. To the contrary, each petitioner

could have elected to receive both undiminished Severance Plan benefits and, at any eligible retirement age, his or her full vested pension benefits without any offset between the two. *No younger employee was entitled to more.* Petitioners also were given an additional choice not available to younger employees: to elect to continue employment for another month and then to receive VEREP's enhanced benefits—to which they had no pre-existing right or entitlement. If petitioners had chosen Severance Plan benefits, they would have received everything eligible younger employees received: Severance Plan benefits and vested pension benefits without any offset. By choosing VEREP, petitioners received even more: a Service Benefit (equal to Severance Plan benefits) and vested pension benefits, *plus* substantial pension enhancements and health insurance benefits without any offset.

In a similar situation, the Court of Appeals for the District of Columbia Circuit likewise held that there was no age discrimination. In *May v. Shuttle, Inc.*, *supra*, the defendant offered severance pay to workers who were furloughed as part of a reduction-in-force; however, it offered furloughed workers over age 55 "a choice of either a retirement package [with enhanced benefits] or severance pay." 129 F.3d at 174. The plaintiffs claimed that the denial of severance pay to those who elected the retirement package violated the ADEA, since all younger workers who were furloughed received severance pay. The court noted the defendant's point that, compared to younger employees, plaintiffs "were given the option of taking the same exact thing (furlough and severance pay) or a better option (retirement and benefits)." *Id.* at 174-75. The court then rejected the plaintiffs' ADEA claims for the same reasons expressed by the Third Circuit in this case:

> Plaintiffs' only evidence of age discrimination in the retirement option matter is that retirement eligible

> employees received a choice and younger employees did not. . . . [Plaintiffs] have presented no evidence that they were treated less favorably than younger employees.

Id. at 175. Like the court in this case, the court in *May* did not need to reach the OWBPA affirmative defenses because there was no *prima facie* violation of the ADEA.

This analysis is consistent not only with the fundamental principles of the ADEA and the fact that the OWBPA provision regarding benefits are stated as affirmative defenses, but also with the concerns that motivated the amendment of 29 U.S.C. § 623(f)(2) by OWBPA. Those concerns focused on the offset of severance benefits by vested pension benefits. The Senate Report to the bill, for example, stated that offsets involving pension benefits present special concerns because such benefits are vested: "*pension benefits are special under federal law*" because pension benefits, "[u]nlike severance (or other benefits) . . . are protected through statutory vesting provisions" under ERISA. Senate Report at p. 23, 1990 U.S.Code & Ad. News at 1528-29 (emphasis in original). The Report cites the example of an older employee who, after being forced to retire upon a plant closing, received less severance pay than younger workers because his severance pay was offset by the present value of his *vested* pension; younger workers, by contrast, received full severance pay plus, when they eventually retired, the full value of their vested pension. *Id.* That is not what happened here.

The dispositive point remains that no petitioner or other employee, younger or older, was required to choose between vested pension benefits and severance pay. Petitioners' only choice involved a special, one-time only enhanced benefit program to which they had no pre-existing entitlement and that was unavailable to younger employees. Petitioners thus were given the choice to receive everything any younger

employee could receive (severance pay and vested pension benefits) or something more (VEREP benefits, including the Service Benefit, plus vested pension benefits). Because petitioners were not treated adversely, their ADEA claims were correctly dismissed as a mater of law.

Even if it were necessary to reach the OWBPA affirmative defenses in this case, resolving petitioners' claims would the require resolving issues not addressed by the courts below. For example, one of the safe harbors in the OWBPA amendment to the ADEA specifically allows the offset of severance benefits by the value of retiree health insurance benefits. 29 U.S.C. § 623(l)(2)(A). The criteria of that provision are met here: under VEREP, petitioners received health benefits and became eligible for an immediate pension following a contingent event unrelated to age. (As noted, a jury and the District Court found that there was no age discrimination in connection with the elimination of petitioners' positions). For purposes of offsetting severance benefits, the value of unlimited duration health benefits when petitioners retired was $59,380.00. *See* 29 U.S.C. § 623(1)(2)(E)(ii) and (iii); *Statistical Abstract of the United States* no. 748 (U.S. Dept. of Commerce 1994) (reflecting a 23.7% increase in the medical component of the CPI from 1990 to 1993). Even as reduced to reflect an actuarial reduction for early retirement, 29 U.S.C. § 623(1)(2)(B), the value of the health benefits received by petitioners completely or substantially offsets their claims for severance pay.

B. The Remaining Questions Stated in the Petition Fail to Present any Legal Issue or Otherwise Are Not Properly Presented

The remaining questions stated in the Petition do not even frame genuine issues. Petitioners' "Question 1" appears merely to restate, in general terms, their "Question 3," addressed in the prior point of this response, concerning the

applicability of the OWBPA affirmative defenses to the facts of this case. The predicate of "Question 2" is contrary to the jury's finding rejecting petitioners' claims of age discrimination in connection with the elimination of their positions and termination of employment. "Question 5," concerning liquidated damages, is not an issue: no violation of the ADEA was found and, therefore, nothing about liquidated damages was raised to or addressed by the courts below.

The first part of "Question 4," as stated in the Petition, appears to be that if the denial of plaintiffs' applications for severance benefits violated the ADEA, it would also violate ERISA. Thus, it depends on "Question 3," already addressed. Petitioners apparently have abandoned the argument, addressed and rejected by the Court of Appeals, that there was some independent violation of ERISA. In any event, the decision below on this point was based on established principles applicable where, as here, a plan document reserves discretion to the plan administrator. (App. 10). *See Firestone Tire & Rubber co. v. Bruch*, 489 U.S. 101, 115 (1989). There is no basis for review by this Court.

The second part of "Question 4" challenges the District Court's exercise of discretion in denying class certification as to the ERISA claim. There is no basis for review by this Court. The Court of Appeals did not even reach the issue of class certification, since it was mooted by the dismissal of petitioners' claims. Further, the District Court's exercise of discretion was based on the application of established principles to the facts and issues presented in this case. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The Petition does not present a question on which there is a conflict or other grounds for review.

CONCLUSION

For these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents

Dated: June 15, 2000

No. 99-1850

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
***pro se*, on behalf of themselves and class of similarly situated persons,**

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

APPENDIX SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI VOLUME IV APP. 145-167

Sandra Slaydon Hawes
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Helmetta, NJ 08828
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Robert A. Muscarella
90 Jamie Court
Monmouth Junction, NJ 08852
(732) 274-2060

Vanita Kadam
Estate of Manohar B. Kadam
14 Stout Court
East Brunswick, NJ 08816
(732) 254-1596

Carolyn Holder
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North Brunswick, NJ 08902
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COPY

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101st Congress-Second Session 1990

Convened January 23, 1990

Adjourned October 28, 1990

Volume 5

LEGISLATIVE HISTORY:

PUBLIC LAWS 101-380 to 101-508

ST. PAUL, MINN.
WEST PUBLISHING CO.

* * * *

F. The burden of proof

The Court in *Betts* erroneously held that section 4(f)(2) is *not* an affirmative defense, and, therefore, that the employee bears the burden of proof under the exception for employee benefit plans.

The Committee wishes to make clear, by adding the last sentence to section 4(f), that the employer bears the burden to plead and prove the defenses and exceptions established in that section. The Committee intends that the amendments made by the bill to section 4(f)(2) - as well as the addition of Section 4(*l*), which establishes certain "safe harbor" defenses for employee benefits independent of section 4(f)(2) - should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defense, section 4(f)(l). Accordingly, the language of section 4(f)(1) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited"* by the ADEA (emphasis added)) has been incorporated as part of section 4(f)(2) and also section 4(*l*) .

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In this regard, the Committee notes with approval the uniform body of federal court decisions holding that the "bona occupational qualification" exception included in section 4(f))(1) is an affirmative defense for which the employer bears the burden of proof. *See. eg. Heiar v. Crawford County,* 746 F.2d 1197-98 (7th Cir.1984)

cert. denied; 472 U.S. 1027 (1985); *Hoefelman v. Conservation* 718 F-2d 281, 283 (8th Cir.1983). *Accord* 29 CFR 1625.6 (position of EE0C). The Committee likewise endorses the position of EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 CFR 1625.7), and expresses approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception. *See Criswell v. Western Airlines,* 709 F.2d 544, 552-553 (9thCir. 1982), *affirmed on other grounds,* 472 U.S. 400 (1985). *See also Laugeson v. Anaconda Co.,* 510 F2d 307, 315 (6th Cir. 1975); Cova v. *Coca-Cola Bottling Co.* of *St. Louis,* 574 F.2d 958, 959-60 (8th Cir.1978).

Finally, nothing in this addition to section 4(f), or in the bill as a whole, is intended to disturb existing pre-*Betts* law with respect to the standards for liability or remedies applicable to unions that are signatories to collective bargaining agreements containing provisions challenged under the ADEA.

G. The effective date

* * * *

RECIEVED
MAY 2 6 1995
NICHOLAS H. POLITAN
U.S.D.J.

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CS 0100
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
DOCKET NO. 94-5332 (NHP)

Civil Action

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA and MANORAR B. KADAM,

Plaintiffs on behalf themselves and classes of similarly situated persons,

v.

JOHNSON & JOHNSON, a New Jersey corporation; the SEVERANCE PLAN OF JOHNSON & JOHNSON and AFFILI ATED COMPANIES; its plan administrator, the JOHNSON & JOHNSON PENSION COMMITTEE; McNEIL-PPC, INC., also known as Personal Products Company, a New Jersey corporation; JOHNSON & JOHNSON WORLDWIDE ABSORBENT PRODUCTS,R MATERIALS . RESEARCH, an unincorporate division of Johnson & Johnson; JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.; a New Jersey corporation; JOHNSON

SECOND AMENDED COMPLAINT AND JURY DEMAND

ORGINAL FILED
MAY 30, 1995
WILLIAM T. WALSH
CLERK

& JOHNSON VISION PRODUCTS, INC.,
a Florida corporation; and as
class action defendants, the
affiliates of the Severance Plan
of Johnson & Johnson & Affiliated
Companies, including: "All-COMPANY
A JOHNSON & JOHNSON COMPANY, a
Delaware corporation; ADVANCED
CARE PRODUCTS, INC., a New Jersey
Corporation, CELLULOSE.PRODUCTS
CORP., a New Jersey corporation,
CODMANN & SHURTLEFF INC., CRITIKON,
INC.,. a Florida corporation,

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ETHICON, INC., a Ohio, corporation,
ETHICON ENDO-SURGERY, an
unincorporated entity doing business in
Ohio; IMMUNOBIOLOGY RESEARCH
INSTITUTE, INC., A New Jersey cor-
poration IOLAB CORPORATION, a
California corporation; JANSSEN
PHARMACEUTICA INC., a New Jersey
corporation; JANSSEN RESEARCH
FOUNDATION, an unincorporated
entity; JOHNSON & JOHNSON ADVANCED
MATERIALS COMPANY, a New
Jersey Corporation; JOHNSON & JOHNSON
DEVELOPMENT CORPORATION, a
New Jersey corporation; JOHNSON &
JOHNSON FINANCE CORPORATION, a
New Jersey corporation; JOHNSON &
JOHNSON HEALTH MANAGEMENT, INC., a
New Jersey corporation; JOHNSON &
JOHNSON HOSPITAL SERVICES, INC., a
New Jersey corporation; JOHNSON &

JOHNSON INTERNATIONAL, a New Jersey corporation; JOHNSON & JOHNSON INTERVENTIONAL SYSTEMS COMPANY, a New Jersey corporation; JOHNSON & JOHNSON MEDICAL, INC., a New Jersey corporation; JOHNSON & JOHNSON MERCK CONSUMER PHARMACEUTICALS CO., a New Jersey corporation; JOHNSON & JOHNSON ORTHOPAEDICS, INC., a New Jersey corporation; JOHNSON & JOHNSON SERVICES, INC., a New Jersey corporation; LIFESCAN, INC., a California corporation; McNEIL CONSUMER PRODUCTS COMPANY, a New Jersey corporation; McNEIL SPECIALTY PRODUCTS COMPANY, a New Jersey corporation; NORAMCO, INC., a Georgia corporation; ORTHO BIOTECH INC., a New Jersey corporation; ORTHO DIAGNOSTIC SYSTEMS INC., a New Jersey corporation; ORTHO PHARMACEUTICAL CORPORATION, a Delaware corporation; SITE MICROSURGICAL SYSTEMS, INC., a Pennsylvania corporation; R.W. JOHNSON PHARMACEUTICAL RESEARCH INSTITUTE, an unincorporated entity doing business in New Jersey; THERAKOS, INC., a Florida corporation;

Defendants.

Plaintiffs Sandra Slaydon Hawes, a resident of the Borough of Helmetta, Middlesex County, New Jersey, Robert A. Muscarella, a resident of the town of Monmouth Junction, Middlesex County, New Jersey, and Manohar B. Kadam, a resident of the city of East Brunswick, Middlesex County, by way of complaint against Defendants, Johnson & Johnson; the Severance Plan of Johnson & Johnson and Affiliated Companies; the Johnson & Johnson Pension Committee; McNeil-PPC, Inc.; Johnson & Johnson Worldwide Absorbent Products & Materials Research; Johnson & Johnson Consumer Products, Inc., Johnson & Johnson Vision Products, Inc., and the remaining corporations and unincorporated entities which are affiliated with a qualified severance plan administered by the Johnson & Johnson Pension Committee, for their complaint say:

JURISDICTION

1. Plaintiffs bring this action in their individual capacities and as the representatives of similarly situated classes of individuals to redress acts of discrimination in the terms conditions or privileges of employment on the basis of age, eligibility for retirement, national origin and handicapping condition, which acts are prohibited by the Age Discrimination in Employment Act (ADEA) as amended, 29 U.S.C. §621 et seq., the Older Worker Benefits Protection Act of 1990 (OWBPA); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq.; and the New Jersey Law against Discrimination (LAD), N.J.S.A. §§10:5-1 et seq, and to redress the deprivation of rights and employee benefits secured by the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§1001 et seq.

* * * *

COUNT ONE

ACTION TO OBTAIN BENEFITS DUE UNDER A QUALIFIED PLAN AND ADDITIONAL EQUITABLE RELIEF

43. Plaintiffs reallege Paragraphs 1 through 42 of their complaint as though fully set forth.

44. Plaintiffs invoke the jurisdiction of this Court over this count of their complaint pursuant to 28 U.S.C. S§1331 and 1337 and 29 U.S.C. S1132(e)(1) in that these claims are authorized by Sections 502(a)(1), (2) and (3) of the Employment Retirement income Security Act of 1974 (ERISA), as codified at 29 U.S.C. S1132(a)(1) through (3).

45. Venue in this court is appropriate pursuant to 29 U.S.C. S1132 (e)(2).

46. The Johnson & Johnson Severance Plan in effect when Plaintiffs were informed that their positions were being eliminated and which was in effect when those positions actually were eliminated provided at least two weeks severance pay per year of service to various groups of employees, including any regular full time salaried employee "whose employment is terminated as a result of an event listed in Article 4. 1 (a) and who elects to retire under a retirement plan of the Company. The listed events include position elimination or a reduction in force.

47. Plaintiffs were regular full-time salaried employees whose positions were eliminated, and they were scheduled to be reduced in force. As such they were eligible for severance pay

as a result of a contingent event unrelated to age.

48. The Johnson & Johnson Severance Plan expressly provided that plaintiffs remain eligible for severance pay even though they elected to retire under a Johnson & Johnson retirement plan.

49. The Johnson & Johnson Severance Plan in effect when Plaintiffs were informed that their positions were being eliminated and which was in effect when those positions actually were eliminated allowed the plan administrator to authorize severance pay in excess of two weeks for each year of service.

50. On or about September 1, 1993, Personal Products Company informed Plaintiff Slaydon Hawes that she was eligible for severance pay totaling $20,092.32 at her biweekly rate of $1,255.77 for 32 weeks starting on October 30, 1993, and continuing until June 10, 1994 or until she became reemployed by Johnson & Johnson or one of its affiliated companies. Plaintiff Hawes has never received this or any other severance payment from Defendants.

51. On or about September 1, 1993, Personal Products Company informed Plaintiff Robert Muscarella that the he would receive severance pay totaling $101,699.91 at his biweekly rate of $2,607.69 for 78 weeks starting on October 30, 1993, and continuing until April 28, 1995, or until he became reemployed by Johnson & Johnson or one of its affiliated companies. Plaintiff Muscarella never received this payment.

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52. On or about September 1, 1993, Personal Products Company informed Plaintiff Manohar B. Kadam that he would receive $90,219.82 at his biweekly rate of $2,315.38 for 78

weeks starting on October 30, 1993, and continuing until April 28, 1995, or until he became reemployed by Johnson & Johnson or one of its affiliated companies. Plaintiff Kadam never received this payment.

53. In October, 1993 Plaintiff Muscarella requested a complete copy of the full plan document for the Johnson & Johnson Severance Plan, and received Exhibit I attached hereto. Exhibit I is a true and correct copy of the Johnson & Johnson Severance Plan in effect on the date of Plaintiffs, terminations, except for an unknown number of pages never provided to Plaintiff Muscarella identifying all the companies affiliated with the Plan.

54. Johnson & Johnson and Personal Products Company as plan sponsors and the Johnson & Johnson Pension Committee as plan administrator failed and continue to fail to respond to Plaintiff Muscarella's repeated requests for the missing pages of the plan document.

55. On December 3, 1993, the Johnson & Johnson Pension Committee in its capacity as plan administrator for the Johnson & Johnson Severance Plan, received an application for severance benefits from Plaintiff Muscarella, submitted in accordance with the procedure set forth *in* the Johnson & Johnson Severance Plan.

56. The Johnson & Johnson Pension Committee in its capacity as plan administrator failed to respond to Plaintiff

Muscarella's application for severance benefits within the time required by the Johnson & Johnson Severance Plan and by federal regulation.

57. On March 4, 1994, more than 90 days from receipt of Plaintiff Muscarella's application for severance benefits,

Johnson & Johnson's Vice President and General Counsel, Frank Bolden, rejected Plaintiff Muscarella's application for severance because "the decision has been made not to permit participation by an employee in both the Severance Plan and VEREP".

58. Johnson & Johnson's vice president and general counsel further informed Plaintiff Muscarella that any severance pay to which he might be entitled had been reduced by the amount of his early retirement benefits to nothing.

59. On March 28.. 1994, Plaintiff Kadam. applied to the Johnson & Johnson Pension Committee for severance benefits in accordance with the Johnson & Johnson Severance Plan's procedures.

60. Johnson & Johnson's general counsel's office informed Plaintiff Kadam that his application for severance had been rejected because "the decision has been made not to permit participation by an employee in both the Severance Plan and VEREP".

61. Johnson & Johnson's general counsel's office further informed Plaintiff Kadam that any severance to which he might be entitled had been reduced by the amount of his early retirement benefits to nothing.

62. In accordance with the procedure set forth in the Johnson & Johnson Severance Plan, Plaintiff Slaydon Hawes applied

on or about April 4, 1994 to the Johnson & Johnson Pension Committee for severance benefits.

63. Johnson & Johnson general counsel's office informed Plaintiff Slaydon Hawes that her application for severance had been rejected because "the decision has been made not to permit participation by an employee in both the Severance Plan and VEREP".

64. Johnson & Johnson's Vice President and Johnson & Johnson's general counsel's office arbitrarily and capriciously denied all Plaintiffs the severance benefits to which they were entitled under the express terms of the Johnson & Johnson Severance Plan.

65. Johnson & Johnson's Vice President and Johnson & Johnson's general counsel's office had no authority to interpret the Johnson & Johnson Severance Plan in such an unreasonable manner or to deny any benefit claim for reasons inconsistent with the Plan documents.

66. The Age Discrimination in Employment Act as amended by the Older Workers' Benefits Protection Act of 1990, 29 U.S.C. S623 (1) (2) (A) (ii) limits any reduction of severance benefit its by pension benefits to the amount of additional pension benefits made available solely as a result of the same contingent event unrelated to age which created severance eligibility.

67. Johnson & Johnson's Vice President and Johnson & Johnson's general counsel's office were aware off but acted in reckless disregard for, this statutory limitation upon the reduction of severance benefits.

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68. Johnson & Johnson's Vice President and Johnson & Johnson's general counsel's office arbitrarily and capriciously unlawfully denied Plaintiffs severance benefits in violation of

the Age Discrimination in Employment Act as amended by the Older Worker's Benefit Act of 1990.

69. Johnson & Johnson's Vice President and Johnson & Johnson's general counsel's office arbitrarily and capriciously ignored both the explicit eligibility provisions of the Johnson & Johnson Severance Plan, and that provision of the Plan which required that it "shall always be construed in compliance with applicable law."

70. By letters dated April 19, 1994, June 6, 1994 and June 8, 1994, Plaintiffs each requested that the Pension Committee as plan administrator review the denials of their severance applications by Johnson & Johnson's vice president and general counsel's office.

71. The Johnson & Johnson Severance Plan as well as 29 Code of Federal Regulations §2560.503-1 (h) (1) (i) required that the plan administrator or other named fiduciary respond to these requests for review within 60 days of receipt if possible, and in any case, to respond after no more than 120 days.

72. Neither the plan administrator nor any named fiduciary nor anyone else provided either a timely or untimely responses to Plaintiffs' requests for review.

73. The failure of Defendants Johnson & Johnson Severance Plan, Johnson & Johnson, the Johnson & Johnson Pension

Committee and its individual members to perform their authorized duties under the Johnson & Johnson Severance Plan and to act in accordance with the claim procedures set forth therein deprived Plaintiffs of a full and fair review of their severance claims and of the fiduciary protection to which they

are entitled as participants in the Johnson & Johnson Severance Plan.

74. By failing to provide Plaintiff Robert Muscarella a complete copy of an instrument under which the plan was established or operated, Defendants Johnson & Johnson Severance Plan, Johnson & Johnson, the Johnson & Johnson Pension Committee and its individual members arbitrarily and without excuse violated their fiduciary and statutory obligations to a plan participant.

75. By failing to pay Plaintiffs severance the amounts to which they are entitled under the terms of the Johnson & Johnson Severance Plan as set forth in the benefits statements provided to them on September 1, 1993, Defendants Johnson & Johnson, the Johnson & Johnson Severance Plan, the Johnson & Johnson Pension Committee and Personal Products Company arbitrarily and without excuse failed to pay benefits in accordance with the express provisions of the qualified plan, and violated their fiduciary and statutory obligations to qualified plan participants.

WHEREFORE, Plaintiffs respectfully pray this Court to:

(a) enter judgement for Plaintiffs by issuing an Order directing Defendants to pay Plaintiff Slaydon Hawes $20,092-32 severance due from October 29, 1993, Robert Muscarella $101,699.91 severance due from October 29, 1993, and Manohar B. Kadam,

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$90,299.82 severance due from October 29, 1993, together with prejudgment and post judgment interest thereon; and

(b) pursuant to 29 U.S.C.§1132(c), assessing a fine of up to $100.00 a day from the date the Johnson & Johnson Severance

Plan Administrator failed to provide Plaintiff Muscarella Plan information to which he was entitled; and

(c) enter an order removing from their positions on the Johnson & Johnson Pension Committee those members who failed to perform their fiduciary duties and replacing them with independent members; and

(d) award Plaintiffs a reasonable attorneys' fee and costs of this action pursuant to 29 U.S.C. -§1131(g); and

(e) grant all other equitable relief to Plaintiffs as the Court may deem just all proper.

COUNT TWO
CLASS CLAIM FOR BENEFITS DUE UNDER A QUALIFIED PLAN

76. Plaintiffs reallege Paragraphs 1 through 75 of their complaint as though fully set forth.

77. Plaintiffs invoke the jurisdiction of this Court over this count of their complaint pursuant to Rule 23(b)(2) and (3) Federal Rules of Civil: Procedure providing for the maintenance of class actions, and under 28 U.S.C. §51331, 1337, 2201 and 2202, and 29 U.S.C. §1132(e)(1) in that these claims for relief are authorized by Sections 502(a)(1), (2) and (3) of the Employment Retirement Income Security Act of 1974 (ERISA), as amended and codified at 29 U.S.C. §1132(a)(1) through (3).

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78. Since 1992 Johnson & Johnson has pursued a policy of streamlining its business and that of its wholly-own subsidiaries and affiliated companies by sharing services

among companies, merging operations, consolidating locations and offering employees enhanced early retirement programs, including the VEREP program.

79. As a result of this effort, Johnson & Johnson reduced its worldwide work force and that of its wholly-owned subsidiaries and affiliated companies from a total of approximately 84,900 employees in 1992 to a total of approximately 81,600 employees in 1993, despite the addition of 900 employees from a newly acquired foreign company.

80. Plaintiffs were affected by this program in that their positions were eliminated and they were reduced in force when Personal Products Company closed its Milltown Engineering Department, New Jersey, and some or all of its functions were consolidated into J&J WAPMR's Milltown operation.

81. Plaintiffs therefore believe that their claims that they were wrongfully denied severance benefits due under the terms of the Johnson & Johnson Severance Plan, and that Defendants breached their statutory and fiduciary duties to plan participants, are typical of claims by other regular full time employees of Defendants Personal Products Company, Johnson & Johnson, Johnson & Johnson Consumer Products, Inc., Johnson & Johnson Vision Products, Inc. or any other Affiliated Company Defendant who at any time since September 8, 1992 accepted early retirement pursuant to Johnson & Johnson's VEREP or similar program at a time when their

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positions were scheduled to be eliminated or reduced in force, and who were denied severance, or who did not apply for severance because they were not informed of the eligibility.

82. Because Plaintiffs were arbitrary denied severance on grounds which apply equally to the similarly situated members of the class they seek to represent, they believe that class members were wrongfully deprived of severance benefits due to them under the terms of a qualified plan.

WHEREFORE, Plaintiffs respectfully pray this Court to:

(a) issue an order pursuant to Rule 23(b)(2) and/or (3) Federal Rules of Civil Procedure certifying Plaintiffs Slaydon Hawes, Muscarella and Kadam. as the representatives of a class composed of regular full time former employees of Defendants Johnson & Johnson, Personal Products Company, Johnson & Johnson Consumer Products, Inc., Johnson & Johnson Vision Products, Inc. or any other Affiliated Company Defendant who since September 8, 1992, accepted early retirement benefits pursuant to Johnson & Johnson's VEREP or similar early retirement program, who believe that they were reduced in force or that their positions scheduled for elimination at the time they accepted participation in the VEREP or similar early retirement program, and who were not paid severance benefits pursuant to the Johnson & Johnson Severance Plan; and

(b) order that Johnson & Johnson pay the expense of notifying potential class members of the pendency of this litigation; and

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(c) enter a declaratory judgement in favor of the class and each of its members declaring that said Defendants unlawfully denied severance benefits due under the Johnson & Johnson Severance Plan to those former employees of Defendants Johnson & Johnson, Personal Products Company, Johnson & Johnson Consumer Products, Inc., Johnson & Johnson Vision Products, Inc. and any other Affiliated Company Defendant

who retired pursuant to Johnson & Johnson's VEREP or similar early retirement program after their positions were scheduled to be eliminated or-they were reduced in Force; and

(d) order specific performance to correct Defendants' wrongful failure to pay to class members the severance benefits due under to Johnson & Johnson Severance Plan; and

(e) award each class member entitled to recover severance benefits prejudgment and post judgment interest on those benefits from the date of separation; and

(f) grant all other relief to class members as the Court may deem just and proper; and

(g) award Plaintiffs a reasonable attorneys' fee and costs of this action to benefit class members.

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COUNT THREE
INDIVIDUAL CLAIMS OF AGE DISCRIMINATION IN DENYING SEVERANCE

83. Plaintiffs reallege Paragraph 1 through 82 of their complaint as though fully set forth.

84. Plaintiffs invoke the jurisdiction of this Court over this count of their complaint pursuant to 28 U.S.C. §§1331, 1343(4), 2201 and 2202, and this court's pendent jurisdiction in that this claim for relief is authorized by the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C §626(c), and the New Jersey Law Against Discrimination (LAD), N.J.S.A. §10:5-13.

85. Severance is included in the term "compensation, terms conditions or privileges of employment" as defined by 29 U.S.C. §623(l) and N.J.S.A. §10:5-12(a), none which may be denied because of any individual's age.

86. Defendants Johnson & Johnson, Johnson & Johnson's Severance Plan, Johnson & Johnson Pension Committee, and Johnson & Johnson's wholly-owned subsidiary, Personal Products Company, discriminated against Plaintiffs in violation of the Age Discrimination in Employment Act and New Jersey's Law Against Discrimination by maintaining and administering a severance policy which offset benefits on a basis prohibited under 29 U. S. C. §623 (1) (2) (A) (ii), disqualified employees otherwise eligible for severance on the basis of age, and disparately impacted older employees, all in violation of the Age Discrimination in Employment Act as amended and codified at 29 U.S.C. §623(a) and by New Jersey's Law Against Discrimination, N.J.S.A. §§10:5-3, 10:5-4 and 10:5-12(a).

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87. Said Defendants treated Plaintiffs and similarly situated employees differently from younger employees on the basis of age by requiring them to forego severance to secure retirement benefits to which they were entitled regardless of their terminations, while allowing terminated employees under the age of 50 to secure unreduced severance while keeping the retirement benefits to which they were entitled.

88. Said Defendants maintained and administered a severance policy which disparately impacted Plaintiffs and similarly situated employees on the basis of age by disqualifying them from severance if they were eligible for early retirement benefits at a time when they were scheduled for termination.

89. Defendants' discriminatory conduct in maintaining and administering severance policies under which Plaintiffs and similarly situated employees were denied severance on the same terms available to similarly situated employees under retirement age was willful in that it was undertaken knowingly and with reckless disregard for the statutory prohibitions upon discrimination on the basis of age in employment.

90. The direct and proximate result of Defendants' discriminatory actions in denying Plaintiffs and similarly situated employees separation or severance pay has been to inflict economic and personal injury upon Plaintiffs, cause them humiliation and suffering, and deprive them of equal employment opportunities and the privileges of employment, including benefits they otherwise

would have been paid in the form of severance and other fringe benefits.

91. As a proximate result of Defendant's discriminatory and wrong act, as set forth above, Plaintiffs and similarly situated employees have suffered personal and economic damage and should be compensated for same.

WHEREFORE, Plaintiffs respectfully pray this Court to:

(a) enter judgment for the Plaintiffs and against Johnson & Johnson, Johnson & Johnson's Severance Plan, the Johnson & Johnson Pension Committee and Personal Products Company by issuing an Order declaring that the practices complained of herein unlawfully discriminate on the basis of age in violation of the Age Discrimination in

Employment Act and New Jersey's Law Against Discrimination; and

(b) awarding judgment for Plaintiffs by issuing an Order directing Defendants Johnson & Johnson, its Pension Committee and Personal Products Company to pay Sandra Slaydon Hawes $20,092.32 severance due from October 29, 1993, Robert Muscarella $101,699.91 severance due from October 29, 1993, and Manohar B. Kadam. $90,299.82 severance due from October 29, 1993, together with prejudgment and post judgment. interest thereon; and

(c) awarding Plaintiffs damages for humiliation, anxiety and emotional distress; and

(d) allowing Plaintiffs liquidated damages in double the amount of their awards pursuant to 29 U.S.C. §626(a); and

[page 35]

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(e) assessing punitive damages for the willful violation of state law; and

(f) awarding Plaintiffs reasonable attorneys' fee and costs of this action pursuant to 42 U.S.C. §1988 and N.J.S.A. §10:5-27; and

(g) granting all other relief to Plaintiffs as the Court may deem just and proper.

* * * *

[page 36]

JA86

Personal Products
MILLTOWN NEW JERSEY 08850 (908) 524-0400

RELEASE

September 1, 1993

For valuable consideration from Personal Products Company/ Johnson and Johnson, receipt of which is hereby acknowledged, Robert A. Muscarella is separated from Personal Products Company/Johnson and Johnson. Robert A. Muscarella will receive separation pay at his biweekly rate of $2,607.69 to be paid biweekly for 78 weeks starting October 30, 1993 and ending April 28, 1995. This amounts to $101,699.91. Robert A. Muscarella hereby releases and forever discharges Personal Products Company, Johnson and Johnson, all J&J subsidiaries and affiliated companies and their officers, directors, agents, successors and assigns (hereafter collectively referred to as the "Company") from any and all rights, causes of action, claims or demands which he has or may have against the Company but not limited to any such rights, causes of action, claims or demands under any equal employment opportunity law, ordinance, regulation or order, included but not limited to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. the Civil Rights Act of 1866 as amended, 42 U.S.C. 1981 et seq., Executive order 11236, as amended, the Age Discrimination in Employment Act of 1967, as amended 29 U.S.C. 621 et seq., and any other applicable federal, state or local constitutional or statutory provision, order or regulation arising from any event or act of omission or commission occurring during the term of his employment with the Company through the date of this release, including any alleged injuries or damages suffered at any time after the date of this release by reason of the continued effects of any such alleged discriminatory acts which occurred an or before the data of this release. It is also agreed that the separation payments being made to you under this paragraph are to be in lieu of and not in addition to any unemployment compensation

payments for the same months or any payments for the same months we might be called upon to make under the terms of your Employee Secrecy Agreement. In the event that you receive any such payments for the same months, we will deduct a comparable amount from the separation payments being made under this paragraph. Also should you become re-employed by Johnson & Johnson or any affiliate, separation payments will cease. Robert A. Muscarella further acknowledges that he has read and understood this agreement and release and further acknowledges that he has had the opportunity to review it with an attorney.

Robert A. Muscarella, further acknowledges that he is executing this agreement and release voluntarily and with, full knowledge of its terms and provisions and of his legal rights with. regard thereto.

You are entitled to 21 days within which to fully consider this Separation Agreement. Following the date that you sign this Agreement, you shall have a period of seven days in which to revoke it.

[end of page 1]

You are advised to consult an attorney regarding this Separation Agreement.

UNSIGNED
Robert A. Muscarella

Dated: _____
State of: _____
County of: _____

On _____, 1993, before me personally came Robert A. Muscarella, sworn by me to be the individual who executed the foregoing RELEASE, and he duly acknowledged that he executed same.

[end of page 2, end of RELEASE] **JA172**

Supreme Court, U.S.
FILED
JUL 6 2000
OFFICE OF THE CLERK

No. 99-1850

In The Supreme Court of the United States

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA, MANOHAR B. KADAM, CAROLYN HOLDER,
***pro se*, on behalf of themselves and class of similarly situated persons,**

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

PETITIONERS' REPY BRIEF

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QUESTIONS PRESENTED

Preface

An employer implemented a voluntary early retirement incentive plan (hereafter "VEREP"). Before the eligibility periods expired the positions of some of the individuals eligible for VEREP were eliminated. Petitioners and prospective class members compose that class of individuals. This class was given no option to remain employed. All remaining individuals had the option of remaining in their positions or retiring under that plan. The employer also eliminated the positions of *others*, not eligible for VEREP, these individuals qualified for severance benefits. Petitioners and prospective class members who qualified for VEREP also qualified for these same severance benefits. Petitioners and the prospective class were denied or required to chose between VEREP and their severance benefits. All petitioners and prospective class members are in the age-protected class; all have pension eligibility status.

This petition presents five questions to the Supreme Court, which collectively, constitutes an issue of first impression.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq*. If so, what is the remedy?

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, prohibit the reduction or denial of severance to those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A)? If so, were the conditions set forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq.*, by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

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I
THE ISSUES BEFORE THIS COURT ARE UNRELATED TO THE JURY'S FINDINGS ON AGE DISCRIMINATION

The jury's findings in this case are unrelated to the severance benefit claims before this Court. The issues presented here stem from summary judgement proceedings below.

The District Court granted Respondents partial summary judgement, on Petitioners' ERISA, ERISA Class and ADEA claims for severance benefits, Counts 1, 2 & 3, see Petition at 9-11, and citing to Appendix [1/]. Petitioners appealed; the 3rd Circuit Court of Appeals affirmed. The remaining counts involving claims of discrimination in terminations of employment based on age and other grounds were tried by a jury or dismissed. Those counts are not in issue here.

II
THE COURTS BELOW APPLIED THE WRONG STANDARD OF REVEIW

The District Court and the 3rd Circuit of Appeals both concluded that Petitioners had failed to establish a *prima facie* case of age discrimination. Therefore neither court deemed it necessary to address Petitioners' arguments on OWBPA's "safe harbors" or affirmative defenses.

Because this is a benefits discrimination case and not a typical age discrimination case, Petitioners submit the lower Courts applied the wrong standard of review at the threshold. This error then deprived Petitioners of the review to which they were entitled, namely whether they had been deprived of statutorily guaranteed protections and benefits. Respondents, once again, seek to perpetuate that erroneous standard of review before this court. See Brief in Opposition at 9,11,12,14, (hereafter "Br.").

[1/] See, APPENDIX SUPPLEMENT, hereafter, "Apps." which includes: Count 1, ERISA at Apps.152-159, Count 2, ERISA CLASS at Apps.159-162, Count 3, ADEA at Apps.162-165, The Release of all Claims of Robert A. Muscarella, UNSIGNED, dated: September 1, 1993 at Apps.166-167, (JA171-172), The Burden of Proof, at Apps.146-147.

III
OWBPA MANDATES THAT AN EMPLOYEE BENEFIT PLAN BE AN AFFIRMATIVE DEFENSE

Respondents argued, and the lower courts found, there is no need to reach affirmative defenses in this case because there is no age-adverse treatment and no *prima facie* case. Br.9, 10-12, 14, 15, and 16 See Opinions at App.15, App.30.

This legal analysis is wrong and stands the OWBPA on its head. Not only does an employer's affirmative defense need to be reached in an age-related benefit claim, it is the only defense to reach. ADEA, as amended by OWBPA mandates that an employee benefit plan be an affirmative defense. Petition at 32.

An affirmative defense is required, when challenged, to justify that any denial or reduction of a severance benefit does not discriminate on the basis of age. It is the only defense for a court of law to examine because severance plan benefit reductions are controlled statutorily and limited to the narrow exceptions that are provided in these three statutes, 29 U.S.C. §623 (f)(2)(i), (ii), or §623 (*l*)(2)(A). Petition at 4.

" Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a) [29 U.S.C. §623 (a)] and accordingly the practice does not have to be justified under section 4(f) [29 U.S.C. §623 (f)(2).]", (emphases added), 29 CFR 1625.10(a)(2) at App.139.

An employer who wants to reduce the level of severance benefits applicable to a pension eligible individual, must justify the lower level by using the narrow exceptions ("safe harbors") that are permitted under the Act and create a plan exception, **"....as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)"**, as required by 29 U.S.C. §623 (f)(2)(emphasis added). Petition at 4.

Having created a benefit plan in compliance with the Act, an employer is then required **" to observe the terms of a bona fide plan"** and also **"...shall have the burden of proving that**

such actions are lawful....., as required by 29 U.S.C. §623 (f)(2). (emphasis added),This clear statutory intent is underscored by the legislative history of this provision. See: The Burden of Proof, 5 U.S. Code & Cong. Admin. News 1535 (101st Cong., 2nd Secession 1990) at Apps.145-147, hereafter, "Burden of Proof".

Thus the terms incorporated into any employee benefit plan become and are unavoidably an employer's affirmative defense. Congress intended it to be so, and enacted it into law.

This is the essence of an employer's affirmative defense.

An affirmative defense is absent from the Brief in Opposition, and Respondents reiterate their pleadings for the inverted rationale, *supra*, in this Court:

> Thus, there is no need to reach these affirmative defenses unless the challenged action otherwise would violate the ADEA, that is, that the action discriminates against the plaintiff on the basis of age. This was the structure of 29 U.S.C.§ 623 (f)(2) before the OWBPA amendments in 1990. *See Public Employees v. Betts,* 492 U.S. 158, 161, 165-66 (1989);.....As the regulation adopted in the OWBPA amendment to 29 U.S.C. §623 (f)(2) recognizes:
>
> "As [the] statutory text makes clear, the section 4(f)(2) exception [29 U.S.C.§ 623 (f)(2)] is limited to otherwise discriminatory actions.....", 29 CFR §1625.10(c). Br.11-12.

Notably, Respondents excised the remainder of the Code's requirement. Petitioners quote the regulation here: "As [the] statutory text makes clear, the section 4(f)(2) exception [29 U.S.C.§ 623 (f)(2)] is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee plan." (emphasis added), CFR §1625.10(c), App.140.

Respondents are required, but have failed, to assert an affirmative defense to justify their denial of severance plan benefits to VEREP *eliminated* individuals. Respondents are required, but have failed, to assert an affirmative defense that VEREP *eliminated* individuals retired voluntarily when there was no option for them to remain employed.

The Brief in Opposition ignores, "..[Respondents'] burden of proving that such actions are lawful", 29 U.S.C. §623 (f)(2), "Burden of Proof" at 1535.

This is the essence of Petitioners' Questions 2 and 3.

IV
BENEFIT CLAIMS BY PENSION-ELIGIBLE EMPLOYEES ARE DETERMINED AS A MATTER OF LAW UPON EXAMINATION OF THE PLAN DOCUMENTS

Respondents discuss "Severance Events" which "trigger" eligibility and disqualification for severance benefits under the provisions of the J&J Severance Plan. Respondents point to the broad discretion conferred to the Pension Committee to apply and interpret the terms of the severance plan. Br. at 5-8, Br.16

Respondents claim extensively here, as in the lower courts, that Subsections 4.1 (a) (iv), 4.1 (b) (viii) and 5.1 (d), granting the Pension Committee "sole discretion" or "absolute discretion", could legally be used to disqualify Petitioners and prospective class members from severance benefits in the absence of any of ADEA's affirmative defenses. The lower Courts have erroneously agreed, Br. at 10-12, App.15, App.30.

Subsection 4.1(b)(ii) of the Plan, disqualifies a pension eligible individual for severance benefits when a normal or voluntary retirement occurs. That same subsection mandates that a pension eligible individual who is eliminated be paid severance. See subsection 4.1(b)(ii), App.49. Here the Plan's terms are direct and come from OWBPA. It is the incorporation of these terms that causes the Plan to be in compliance with the OWBPA amendments. Thus, subsection

4.1(b)(ii) is not just an ERISA promise to pay severance benefits to pension eligible individuals who are eliminated, but mandates that those severance benefits be paid, 29 U.S.C. 623 (f)(2)(B)(i). The Plan's incorporation of the terms in Article 8.2 Controlling Law, requires the Pension Committee to always construe the Plan in compliance with applicable law, see App.57. Here an employer or an administrator may be granted wide discretion in interpreting and applying the terms in an ERISA benefit plan. That discretion does not include determining a matter of law contrary to ADEA, or in practice, contrary to terms that are mandated in the Plan, because in effect the plan is the law.

As noted, Respondents argued and the lower courts found, that "sole discretion" or "absolute discretion" reserved in an ERISA plan required the "arbitrary and capricious" standard to apply. Therefore the Pension Committee's "absolute discretion" would control the level of severance benefits paid to a pension eligible individual. This analysis contravenes the ADEA, as amended by OWBPA and is erroneous as a matter of law.

V
A "MUTALLY EXCLUSIVE" DEFENSE AND A 29 U.S.C. §623 (*l*)(2)(A) "AFFIRMATIVE DEFENSE" ARE UNAVAILABLE TO RESPONDENTS IN THIS CASE

In their Brief in Opposition, Respondents state that Petitioners were not eligible for severance benefits because they "elected to retire under the enhanced benefit program", Br. at 2. Respondents seek to perpetuate before this Court a false dichotomy between vested severance rights as a result of Petitioners' terminations and their VEREP "elections" rights.

The "enhanced benefit program" to which Respondents refer, is the voluntary early retirement incentive plan, VEREP. Respondents blatantly misrepresent in this Court, as in the lower courts, without plan or statutory citation, that the two benefits, VEREP and severance benefits, were conditioned as "mutually exclusive", one or the other, not both. **"Because**

they elected to retire under the enhanced benefit program, Petitioners were not eligible to also receive severance benefits,....." Br. at 2. (emphasis added)

In the Appendix submitted to this Court, Petitioners have included both plans in their entirety, the VEREP at App.66-73 and Severance Plan at App.44-58. Petitioners have included the ADEA statutes that are controlling of each plan. Severance Plan, 29 U.S.C. 623 (f)(2)(B)(i). Voluntary early retirement incentive plan, 29 U.S.C. 623 (f)(2)(B)(ii), App.132-133. In the Brief in Opposition, Respondents cite to neither plan nor statute that supports a "mutually exclusive" defense, Petition at 15-17.

The 3rd Circuit Court of Appeals' erroneous conclusions arise out of this false dichotomy, and Respondents' citation of May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997) below, Br. 11, 12, 13 & 14, Petition at 16-17. In May the enhanced pension benefits and the severance benefits were made available solely as a result of the same contingent event unrelated to age, see e.g., 29 U.S.C. §623 (*l*)(2)(A)(ii), App.134. In May the qualification for either benefit was termination, Petition at 16, 21-22. Where a voluntary early retirement incentive plan applies, termination is a prohibition not a qualification.

"Even if it were necessary to reach the OWBPA affirmative defenses .....ADEA specifically allows the offset of severance benefits by the value of retiree health insurance benefits. 29 U.S.C. §623 (*l*)(2)(A)." Br.15, (emphasis added).

Respondents **can not assert** a 29 U.S.C. §623 (*l*)(2)(A) affirmative defense in this case because: 1) it is not incorporated into either Plan; 2) VEREP is age-related; and 3) it would have been illegal to have done so because a 29 U.S.C. §623 (*l*)(2)(A) affirmative defense requires a termination as a qualification which is a prohibition in a 29 U.S.C. 623 (f)(2)(B)(ii) affirmative defense. Petition at 16, 21-22.

A " mutually exclusive" and a 29 U.S.C. §623 (*l*)(2)(A) "affirmative defense" are unavailable to Respondents for Petitioners' ERISA , ERISA CLASS and ADEA Claims in this

case. See Appendix Supplement, Counts 1, 2 and 3, Apps.152-165. See also Petition at 24.

VI

THE RIGHT TO VEREP VESTED INDEPENDENTLY OF THE RIGHT TO VESTED SEVERANCE BENEFITS

The 3rd Circuit Court of Appeals erroneously concluded that vested severance benefits were not deducted from vested pension benefits in this case, Br.9, App.14. This error is based on Respondents' false dichotomy, and misapplication of May, cited *supra* .

Respondents, once again, seek to perpetuate an erroneous conclusion in this Court. **"Petitioners also were given an additional choice not available to younger employees:.....to receive VEREP's enhanced benefits- to which they had no pre-existing right or entitlement,"** Br.13, (emphasis added).

No pre-existing right or entitlement existed for any VEREP individual until their individual window period of eligibility opened. That right was vested until the window closed. Once closed, the right expired, Petition at 7.

It is completely disingenuous for Respondents to suggest here that: 1) VEREP was not a vested right, 2) somehow VEREP was "gifted" to Petitioners, and 3) VEREP was made available as a result of position eliminations, as in May.

"The dispositive point remains that no petitioner or other employee, younger or older was required to choose between vested pension and severance pay", Br. at 14, (emphasis added). Respondents here, blatantly ignore Petitioners' Hobson's Choice, Petition at 7-9, and perpetuate the erroneous conclusion still further.

All VEREP individuals, including VEREP *eliminated* individuals, had earned the vested right to VEREP retirements because they met the eligibility requirements, Petition at 7.

Severance eligibility for VEREP *eliminated* individuals was created when they were eliminated under the same terms and conditions as the *others* that were eliminated, 623 (a) (1) and 623 (a) (2). Respondents provided severance benefits to *others* and in so doing created the same severance eligibility rights for VEREP *eliminated* individuals, Petition at 7-9.

In a " privilege of employment case", it is irrelevant that the employer had no obligation to provide the benefit. Once an employer decides to grant an opportunity to some, "it may not deny this opportunity to others because of their age." DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 725 (3D Cir.1995) quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (emphasis added).

A "right" to an employee benefit is "vested" when, as a matter of law, it can not be taken away. The VEREP and severance benefits are "vested" rights, because in this case they arise from independent events that can not be taken away as a matter of law. That is exactly the "Hobson's Choice" that is in this case, Petition at 9.

VII
VEREP's "SERVICE BENEFIT" AND SEVERANCE BENEFITS ARE NOT FUNGIBLE

Respondents blatantly misrepresent here, as in the lower courts, without plan or statutory citation, that the "Service Benefit", is the same thing as a severance benefit. The 3rd Circuit Court of Appeals erroneously concluded that the "Service Benefit" is the same thing as a severance benefit, 3rd Op.11, App.10-11.

Respondents perpetuate that misconception in this Court. **"..... a Service Benefit (equal to Severance Plan Benefits).. "** Br. at 13. **"...were similar in nature and amount"**, Br. at 8. **"The Service Benefit was equal to the benefit provided under the Severance Plan....."** Br. at 4. **"These benefits included the Service Benefit, which benefit alone was equal to Severance Plan benefits"**, Br. at 5. (emphasis added).

The Service Benefit is a pension benefit for two reasons, 1) it is only available with VEREP retirements, and 2) its characteristics as predetermined and so set in the plan by the employer, are that of a pension benefit. Petition at 6.

Pension benefits are not a substitute for severance pay, Equal Employment Opportunity Commission v. Westinghouse Electric Corp. ("Westinghouse II"), 869 F.2d 710 3d Cir.

1989); vacated and remanded for reconsideration under "Betts".

VEREP's vested "Service Benefit" and vested severance benefits are not fungible.

VIII
RESPONDENTS USED A SUBTERFUGE IN RECKLESS DISREGARD OF ADEA's PURPOSES AND PROTECTIONS

In this case, Respondents: 1) disregarded the terms of subsection 4.1(b)(ii) and Article 8.2 Controlling Law that mandated that severance benefits be paid to pension eligible individuals when eliminated; 2) disregarded that an option to remain employed was mandated in implementing VEREP; 3) disregarded that severance liability was created because of position eliminations; and 4) integrated a corporate wide policy scheme that denied severance benefits to a class of pension eligible employees by compelling them to retire. This policy scheme effectively avoided the corporation's liability, and deprived a class of pension eligible individuals of their severance benefits, to which they were entitled as a matter of law. Petition at 25-28. See also, App.99 at ¶8.

Respondents' policy scheme also integrated two statutory violations of ADEA, 29 U.S.C.§ 623 (f)(2)(B)(i), CFR §1625.10 (a)(2), App.139 and 29 U.S.C.§ 623 (f)(2)(B)(ii), CFR §1625.10 (d)(7), App.142.

In addition, Respondents' Brief in Opposition fails to refute the merits of the Petitioners' arguments.

This is the essence of Petitioners' Question 5.

IX
AGE RELATED EMPLOYEE BENEFIT CLAIMS ARE SERIOUS POLICY ISSUES THAT MUST BE ADDRESSED BY THE SUPREME COURT OF THE UNITED STATES

Respondents' actions left Petitioners and prospective class members with a Hobson's Choice. VEREP *eliminated* individuals were compelled to forego their severance rights to

secure pension benefits for themselves, their spouses and other dependants who would be deprived of the continuation of lifetime of medical, life insurance and other dependent coverage. VEREP, compelled their "choice".

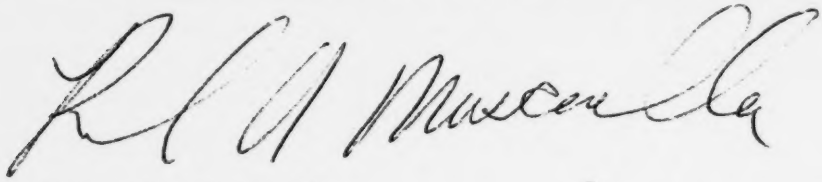
Petitioners present five Questions, collectively constituting an issue of first impression, which seriously affect the pension and benefit rights of pension eligible individuals. This class of American workers, a large and growing population, is the primary target in corporate downsizing. If eliminated, they face the possibility of using their retirement savings, rather than severance benefits, for living expenses. It is very unlikely that any would have the financial resources to pursue a legitimate benefit claim, while unemployed, against a corporate colossus brandishing vast persuasive power and limitless financial resources.

A major purpose of the OWBPA amendments enacted by Congress was to protect pension eligible individuals from just the types of egregious acts and the fundamental violations that are present in this case. Congress enacted into law the standards that must be followed, "equal benefit or equal cost" and the "affirmative defense", 29 U.S.C.§ 623 (f)(2)(B), and in so doing could not have sent a clearer warning to employers: do not deny severance benefits based on pension eligibility or receipt of pension benefits.

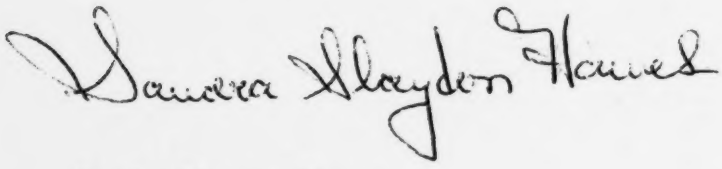
An employer's large-scale implementation of a corporate wide policy scheme that compels retirements and denies severance benefits to pension eligible individuals requires close scrutiny and examination by this Court in light of OWBPA's express mandates. Just as this Court definitively laid to rest the issue of ADEA waivers under Title II of OWBPA in Oubre v. Entergy Operations, Inc., 118 S. Ct. 838 (1998), so Petitioners submit the time has come to do the same with respect to the issues presented here under Title I. It is respectively urged that this Court definitively articulate the full force and effect of the protections afforded to older workers by OWBPA, and give guidance to the lower Courts faced with these issues of law.

Petitioners pray that *certiorari* is granted for all Questions.

Respectfully submitted by each named petitioner *pro se* ,



Robert A. Muscarella



Sandra Slaydon Hawes

Carolyn Holder

Vanita Kadam, the estate of Manohar B. Kadam

Dated: [illegible] 05 2008

Supreme Court, U.S.
FILED
SEP 13 2000
CLERK

(8)

No. 99-1850

In The Supreme Court of the United States

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA, MANOHAR B. KADAM, CAROLYN HOLDER,
***pro se*, on behalf of themselves and class of similarly situated persons,**

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF

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COPY

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QUESTIONS PRESENTED

Preface

An employer implemented a voluntary early retirement incentive plan (hereafter "VEREP"). Before the eligibility periods expired the positions of some of the individuals eligible for VEREP were eliminated. Petitioners and prospective class members compose that class of individuals. This class was given no option to remain employed. All remaining individuals had the option of remaining in their positions or retiring under that plan. The employer also eliminated the positions of *others*, not eligible for VEREP, these individuals qualified for severance benefits. Petitioners and prospective class members who qualified for VEREP also qualified for these same severance benefits. Petitioners and the prospective class were denied or required to chose between VEREP and their severance benefits. All petitioners and prospective class members are in the age-protected class; all have pension eligibility status.

This petition presents five questions to the Supreme Court, which collectively, constitutes an issue of first impression.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq*. If so, what is the remedy?

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, prohibit the reduction or denial of severance to those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A)? If so, were the conditions set forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq.*, by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

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[1/] The purpose of this brief is to bring to this Court's attention the recent decision in Erie County Retirees Ass'n et al v. County of Erie et al, 220 F.3d 193 (3d Cir. 2000). The other cases listed above are cited and/or discussed in that decision.

I
INTRODUCTION

The 3rd Circuit Court of Appeals recently found the ADEA, as amended by OWBPA, applicable where an employer offers its Medicare-eligible retirees health insurance coverage allegedly inferior to the coverage it offers to other retirees who are not eligible for Medicare. Erie County Retirees Ass'n et al v. County of Erie et al, 220 F.3d 193 (3d Cir. 2000), ("Erie").

Erie was decided on August 1, 2000, Petitioners' last date of filing in this Court was July 6, 2000.

Held: The ADEA, as amended by OWBPA, applies when an employer offers its Medicare eligible retirees health insurance coverage inferior to the coverage offered to other retired employees not eligible for Medicare. Id. at 217.
Held: Medicare eligibility, a factor analytically indistinct from age, is a direct proxy for age. Id. at 211.
Held: Employer's policy based on a factor analytically indistinct from age, discriminates on its face. Id. at 210-212
Held: Where employer's policy discriminates on its face, the motivating factor is immaterial in determining adverse treatment. Id. at 212-313.
Held: Employer's "reasonable factors other than age" defense inapplicable where the employer engages in explicit age-based discrimination. Id. at 214-215.

Petitioners contend the implication of Erie, is: where an employer's policy is based on a factor analytically indistinct from age, the policy is discriminatory on its face and the employer discriminates "because of.....age; ". 29 U.S.C. §623 (a) (1) & (2). See Id. at 210-212. Petitioners contend further, where an employer's policy provides lower employee benefits to age-protected individuals, based on a factor analytically indistinct from age, the conduct violates the ADEA, as amended by OWBPA, unless one of ADEA's "safe harbors" is applicable. Id. at 215.

Respondents in Hawes, as did the employer in Erie, argued that there is no *prima facie* showing of age-adverse treatment. Each relied heavily on Hazen Paper Co. et al., v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, ("Hazen Paper"). The Supreme Court emphasized in that case the ADEA is not violated when an employer's decision is wholly motivated by factors other than age. Id. at 611. Erie at 211. However, the Court in Hazen Paper left open specific questions i.e.: ".....an employer who targets **employees with a particular pension status** ....." Id. at 611. Erie at 211. "..dual liability under ERISA and ADEA where the decision was motivated by both the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, ..." Id. at 613. Erie at 211. (Emphasis added.) Petitioners submit that all of the questions left open in Hazen Paper are applicable to petitioners and prospective class in this case. *The day to examine the "special case" and issues left open in Hazen Paper has arrived.* See Section III, pages 3-4 *infra*; Petition at 34-36.

II
THE EFFECT OF ERIE ON THIS CASE

In Erie, the employees' sole argument was that the safe harbor set forth in ADEA 29 U.S.C. § 623(f)(2)(B)(i) is the only available defense. Erie at 211, 213-214. That "safe harbor" incorporates, as a matter of law; 1) the equal benefit-equal cost principle, and 2) the mandate that the employer is to bear the burden to plead and prove the defenses and exceptions established in that section, i.e. the employer's affirmative defense. Erie at 198-199 & footnote 3. See Burden of Proof at Apps.145-146. See Petition at 21. See Petitioners' Reply Brief at 2-4, hereafter "Prb."

The Third Circuit first considered the background circumstances of the OWBPA which lead to its passage beginning with the Supreme Court's decision in Ohio Public Employees Retirement Sys. v. Betts, 492 U.S. 158 ("Betts").

See Erie at 202-206. The Erie Court then noted: "While the legislative history may provide assistance in resolving ambiguity, the language of the statute must guide us in the first instance." Erie at 208.

The Court in Erie found the employees' threshold showing of "allegedly inferior" coverage sufficient to require the employer's affirmative defense in accordance with the statute. In so finding, the Court properly placed the burden of proof on the employer to plead and prove the "allegedly inferior" coverage was within the standard as prescribed in section 623 (f)(2)(B)(i). Erie at 208-210, 213.

The threshold showing in Hawes, as in Erie, mandates respondents to plead and prove an affirmative defense under any one of the safe harbors established by OWBPA. Respondents are affirmatively required to prove the reason for denial of severance benefits does not discriminate on the basis of age. Where an employer cannot meet the burden of proof, the employer discriminates "because of .... age;".

Petitioners reiterate, in Hawes, as in Erie, the only defense available to respondents is one of the affirmative defenses provided by OWBPA's "safe harbors". That affirmative defense necessarily applies to petitioners' prospective class as well. See Petition at 20-22, 24, Prb. at 2-4. See also Erie at 198: "On February 10, 1999, the [district] court certified the action as an opt-in class action." Erie at 198.

III

MEDICARE AND PENSION ELIGIBILITY ARE BOTH DISTINGUISHABLE AS A "SPECIAL CASE" IDENTIFIED IN HAZEN PAPER; EACH IS DISCRIMINATORY ON ITS FACE

The Erie Court found Medicare eligibility to be a protected trait and therefore distinguishable from Hazen Paper, *supra.* The Court recognized the protected trait as the "special case'" question left opened by the Supreme Court in Hazen Paper. The Third Circuit stated:

> We find Hazen Paper to be distinguishable. Medicare eligibility does not merely "correlate[ ] with age," see id. at 608, 113 S.Ct. at 1705, as does years of service. Rather, as the district court here pointed out, Medicare eligibility "follow[s] ineluctably upon attaining age 65." Erie County, 91 F.Suppl.2d at 867. ***** Thus, Medicare status is a direct proxy for age. This case is therefore parallel to the "special case" mentioned by the Court in Hazen Paper, where an adverse action is taken against a person because of a particular event (i.e. approaching pension vesting) and that event in turn occurs because the person has attained a certain age. See DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 730 n.12 (3d Cir. 1995) (implying that the ADEA is violated "when a company's policy distinguishes employees on the basis of a factor analytically indistinct from age").

Erie at 211 (emphasis added)

The Erie Court cited the identical legislative history of OWBPA as did petitioners (Petition at 18, 21), namely:

> During debates on the OWBPA, Representative Clay indicated that Medicare status is a proxy for age. See 136 Cong. Rec. H8617 (daily ed. Oct. 2, 1990) (statement of Rep. Clay) ("[E]mployers must be prohibited from providing older workers smaller benefits or no benefits solely because of their age or other proxies for age for example, pension or Medicare eligibility."); see also S. Rep. No. 101-263, at 23 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1528 (indicating that, where "[p]ension-eligibility is a proxy for age . .. it is per se age discrimination to use pension-eligibility as a basis for denying an older worker any other benefit.")

Erie at 211, footnote 10 (emphasis added)

The Third Circuit in Erie examined and cited Johnson v. New York, 29 F.3d 75 (2d Cir. 1995). In that case, a mandatory condition of employment required plaintiff to

maintain "dual status" in the Air National Guard ("ANG"), while employed as a security guard at the air base. When plaintiff turned 60 he was force to resign from the ANG and according he was fired as a security guard. The Third Circuit cited Johnson: "[The] consequent mandatory requirement at 60 ..... is not merely correlated with age; unlike Hazen Paper, the employer's decision here in fact implements an age-based criterion. .....age and termination are inextricably linked. The sole reason for plaintiff's termination was age." "Id. at 79-80 (citation and internal quotation marks are omitted." Erie at 211-212.

The Third Circuit then applied the analysis in Johnson to Erie and held: " Similarly, in our case, [the employer] 'implement[ed] an age-based criterion' by placing Medicare-eligible retirees in the [inferior coverage]." Erie at 212.
See also footnote 12 at id. 212.

The Third Circuit, in citing its previous decision in DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 726 (3d Cir. 1995), at footnote 9, acknowledged the employees' facially discriminatory theory in Erie:

> Appellants' theory is that the [employer] has adopted a facially discriminatory policy with respect to retiree health coverage. We have commented as follows regarding facially discriminatory policies:
>
> > We agree that when a policy facially discriminates on the basis of the protected trait, in certain circumstances it may constitute per se or explicit age discrimination. And, whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. This is because, in a facial disparate treatment case, the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis. Thus, when the policy itself displays the unlawful

> categorization, the employee is relieved from independently proving intent.
>
> DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 726 (3d Cir. 1995) (citations and internal quotation marks omitted).

Erie at 211 (emphasis added)

The uncontested record in Hawes establishes that only VEREP *eliminated* individuals,[2/] were denied or were required to choose between "voluntary" retirement and the severance they qualified for as a result of their terminations. See "Hobson's Choice", Petition at 6-8, 35. Respondents' severance policy distinguished petitioners and the prospective class on the basis of pension eligibility; therefore respondents' severance policy is age discriminatory on its face. In Hawes, pension eligibility, like Medicare eligibility, a factor analytically indistinct from age, is the basis for the denial of severance benefits, hence petitioners and the prospective class established a *prima facie* case based on age.

The Erie Court then held the motivating factor in a facially discriminatory policy to be of no consequence when determining adverse treatment, stating:

> The fact that there is no reason to believe that the [employer] possessed a malevolent motive or acted on the basis of hostile age-based stereotypes is irrelevant. The Supreme Court has indicated that a policy explicitly based on a prohibited factor such as sex or age -- is illegal regardless of the underlying motive:
>
> > [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect..... The beneficence of

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[2/] VEREP's pension eligible employees who were eliminated with no option of remaining employed as compared to VEREP pension eligible individuals who had the option of remaining employed. Petition at 7.

> an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination.....

Erie at 212, quoting from International Union v. Johnson Controls, Inc. , 499 U.S. 187, 199-200, 111 S.Ct.1196, 1203-04 (1991).

The Third Circuit found unequivocally that the employees had established a claim of age discrimination under 29 U.S.C. § 623(a)(1). The Court stated:

> The first step in our analysis is to determine whether plaintiffs have established a claim of age discrimination under section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1). That provision makes it unlawful for an "employer" to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." .....The latter phrase is explicitly defined in the ADEA, as amended by the OWBPA, to include "all employee benefits." See 29 U.S.C. § 630(*l*). ... We believe that the ordinary meaning of the term "employee benefit[s]" should be understood to encompass health coverage and other benefits which a retired person receives from his or her former employer.

Erie at 208-209 (emphasis added)

The Third Circuit then concluded this analysis stating:

> In sum, we conclude that the [employer] has treated [these employees] differently than other retirees with respect to their "compensation, terms, conditions, or privileges of employment, because of . . . age." Accordingly, appellants have established a claim of age discrimination under 29 U.S.C. § 623(a)(1), unless any of the ADEA's "safe harbors" is applicable.

Erie at 213 (emphasis added)

Erie clearly establishes that where an employer's policy provides lower benefits to age-protected individuals, based on a factor analytically indistinct from age, that employer violates the ADEA, as amended by OWBPA, unless any of the ADEA's "safe harbors" is applicable.

IV
THE ERIE COURT HELD INAPPLICABLE THE EMPLOYER'S "REASONABLE FACTORS OTHER THAN AGE" DEFENSE

The employer in Erie argued it was entitled to the "reasonable factors other than age" defense set forth in 29 U.S.C. § 623 (f) (1). The Third Circuit rejected this argument, stating:

> We are not persuaded that the "reasonable factors other than age" defense is applicable. While it is possible that Congress intended Medicare eligibility to be a "reasonable factor other than age," we believe it is more likely that Congress would have drafted a specific provision addressing the issue rather than to rely on the courts to make a particular interpretation of the term "reasonable factors other than age." In reaching this conclusion, we point out that the legislative history we have cited demonstrates that when Congress passed the OWBPA it expressly considered the issue of availability of Medicare coverage. In addition, we note that the "reasonable factors other than age" defense has been held inapplicable to a policy which explicitly discriminates based on age. See EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1541 (2d Cir. 1996) ("[A]n employer has a defense if his policy is based on reasonable factors 'other than age,' not if the policy is reasonably based on age. By its terms, the statute supplies an exception for 'age-neutral' decisions based on other factors such as health or even education that might be correlated with age, not an exception for policies that explicitly but reasonably discriminate based on age.") (citation omitted). Here, the [employer] has engaged in

explicit age-based discrimination by using a proxy for age-Medicare eligibility--as a basis for differential treatment. Erie at 214-215 (emphasis added)

When Congress passed the OWBPA, akin to Medicare benefits in Erie, it specifically considered severance benefits. In so doing, Congress expressly made available precise exceptions and statutorily controlled severance benefit reductions. An employer may not use any other method to deny or reduce these benefits to avoid its liability. Accordingly, as in Erie *supra,* the "reasonable factors other than age" defense is equally inapplicable in Hawes. As also recognized in Erie, an employer engages in explicit age-based discrimination by using Medicare eligibility, a direct proxy for age, as a basis in denying benefits. In Hawes, as in Erie, respondents have engaged in explicit age-based discrimination using pension eligibility, a direct proxy for age, to deny severance benefits.

V

THE FINDINGS IN ERIE CORROBORATE PETITIONERS' CONTENTION THAT ADEA, AS AMENDED BY OWBPA IS CONTROLLING WHERE BENEFITS ARE APPLIED TO AGE PROTECTED INDIVIDUALS

The Erie Court acknowledged that the employees had correctly interpreted the statute, to writ:

> Appellants contend that the only possibly applicable safe harbor under the ADEA is that set forth in 29 U.S.C. § 623 (f)(2)(B)(i), which adopts the equal benefit or equal cost principle. Appellants argue that the [employer] cannot satisfy that principle because it is providing lesser benefits to retirees age 65 and over as compared to younger retirees while simultaneously incurring lesser costs on the older retirees' behalf. The [employer] argues that it is entitled to the benefit of the "reasonable factors other than age" defense set forth in 29 U.S.C. § 623 (f) (1). The district

court merely held that "the ADEA clearly was not intended to apply to retirees," Erie County, 91 F. Supp.2d at 880. Thus, the district court's view is that employers may treat .....retirees differently.....without meeting the equal benefit or equal cost standard. Effectively, then, the district court recognized a safe harbor in addition to any explicitly set forth in the ADEA or the OWBPA.

Erie at 213-214 (emphasis added)

We cannot, however, accept the district court's approach for the straightforward reason that it is not reflected in the actual language of the ADEA or the OWBPA. Congress knew how to craft exceptions to the ADEA, as there are several explicitly worded safe harbors in 29 U.S.C. § 623. Yet, aside from section 623(f)(2)(B)(i), there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility.

*****

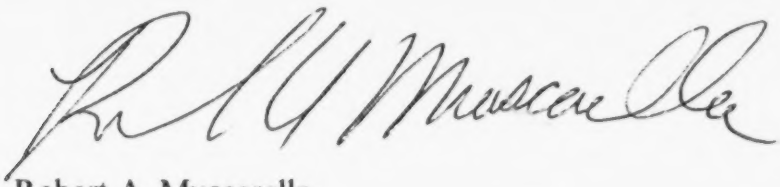
We believe that the appellants have put forth the proper interpretation of the statute, and thus we hold that the safe harbor set forth in 29 U.S.C. § 623(f)(2)(B)(i) is applicable in this case if the [employer] can come within it. The plain language of section 623(f)(2)(B)(i) supports this conclusion by expressly adopting the statement of the equal benefit or equal cost principle as set out in 29 C.F.R. § 1625.10 (1989).

Erie at 214-215 (emphasis added).

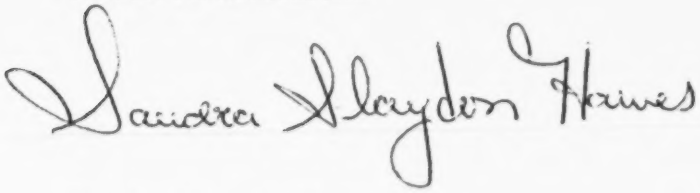
CONCLUSION

Petitioners respectively submit the Erie decision supports a grant of *certiorari* in their case. The Third Circuit decisions in Erie and in petitioners' case are irreconcilable. It is therefore, up to this Court to resolve this compelling issue once and for all, in conformity with the controlling statutes.

Respectfully submitted by each named petitioner *pro se* ,

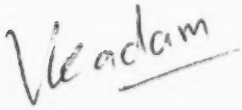


Robert A. Muscarella



Sandra Slaydon Hawes

Carolyn Holder



Vanita Kadam, the estate of Manohar B. Kadam

Dated: SEP 11 2009